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EDITOR'S NOTE

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No. 86-1471-ADX
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Docketed:
March 12, 1987

Title: Richard A. Lyng, Secretary of Agriculture, Appellant
v.
International Union, United Automobile Aerospace and Agricultural Implement Workers of America, UAW, et al.

Court: United States District Court
for the District of Columbia

Counsel for appellant: Solicitor General

Counsel for appellee: McHugh,Richard W., Scott,Judith A., Kahn,Wendy

Entry	Date	Note	Proceedings and Orders
1	Jan 30 1987		Application for extension of time to docket appeal and order granting same until March 12, 1987 (Chief Justice, February 2, 1987).
2	Mar 12 1987	G	Statement as to jurisdiction filed.
3	Apr 15 1987		Motion of appellees Internalt. Union UAW, et al. to affirm filed.
4	Apr 15 1987		DISTRIBUTED. May 1, 1987
5	Apr 23 1987	X	Reply brief of appellant Lyng, Sec. of Agriculture filed.
6	May 4 1987		PROBABLE JURISDICTION NOTED.
			**********
7	Jun 18 1987		Joint appendix filed.
8	Jun 18 1987		Brief of appellant Lyng, Sec. of Agriculture filed.
10	Jul 15 1987		Order extending time to file brief of appellee on the merits until July 31, 1987.
11	Jul 28 1987		Record filed.
12	Jul 31 1987		Brief amicus curiae of ACLU Foundation filed.
13	Jul 31 1987		Brief of appellees Internalt. Union UAW, et al. filed.
14	Aug 6 1987		CIRCULATED.
15	Oct 9 1987		SET FOR ARGUMENT. Monday, December 7, 1987. (1st case).
16	Dec 7 1987		ARGUED.

JURISDICTIONAL

STATEMENT

86 1471

No.

In the Supreme Court of the United States

OCTOBER TERM, 1986

RICHARD A. LYNG, SECRETARY OF AGRICULTURE,
APPELLANT

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS
OF AMERICA, UAW, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Section 6(d)(3) of the Food Stamp Act, 7 U.S.C. 2015(d)(3), generally provides that a household shall not become eligible to participate in the food stamp program at any time that a member of the household is on strike. The statute further provides that a household already participating in the program shall not receive an increased allotment of food stamps by reason of the loss of income occasioned when a member of the household goes on strike. The question presented is whether this statute is unconstitutional as violative of the First Amendment, the Due Process Clause or the Equal Protection component of the Fifth Amendment.

II

PARTIES TO THE PROCEEDING

In addition to those named in the caption, the parties are: United Mine Workers of America (UMWA); Mary Berry; Johnie B. Blake; Barm Combs; Patricia Ann Combs; Mark Dyer; Geneva Dyer; and a class of persons composed of certain UAW and UMWA strikers and their households.

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In the Supreme Court of the United States

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No.

RICHARD A. LYNG, SECRETARY OF AGRICULTURE,
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*ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA*

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The decision of the district court holding the relevant provision of the Food Stamp Act unconstitutional is reported at 648 F. Supp. 1234 (App., *infra*, 1a-16a). An earlier decision of the district court (App., *infra*, 17a-47a) is reported at 648 F. Supp. 1241. Subsequent decisions and orders of the district court are not yet reported (App., *infra*, 48a-65a, 66a-70a, 71a-72a).

JURISDICTION

The order of the district court declaring the statute unconstitutional (App., *infra*, 71a-72a) was entered on November 14, 1986. The order of the district court enjoining the Secretary from enforcing the statute (App., *infra*, 48a-50a) was entered on December 22, 1986. A notice of appeal to this Court (App., *infra*, 73a) was filed on December 11, 1986, and an amended notice of appeal (App., *infra*, 74a) was filed on December 30, 1986. On

February 2, 1987, the Chief Justice extended the time within which to docket this appeal to and including March 12, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

STATUTORY PROVISION INVOLVED

7 U.S.C. 2015(d)(3) provides:

> Notwithstanding any other provision of law, a household shall not participate in the food stamp program at any time that any member of such household, not exempt from the work registration requirements of paragraph (1) of this subsection, is on strike as defined in section 142(2) of title 29, because of a labor dispute (other than a lockout) as defined in section 152(9) of title 29: *Provided,* That a household shall not lose its eligibility to participate in the food stamp program as a result of one of its members going on strike if the household was eligible for food stamps immediately prior to such strike, however, such household shall not receive an increased allotment as the result of a decrease in the income of the striking member or members of the household: *Provided further,* That such ineligibility shall not apply to any household that does not contain a member on strike, if any of its members refuses to accept employment at a plant or site because of a strike or lockout.

STATEMENT

The Food Stamp Act of 1964, 7 U.S.C. (& Supp. III) 2011 *et seq.*, established a public welfare program, funded by the Department of Agriculture and administered by state agencies, that supplements the food purchasing power of low-income households. This suit was brought by a number of potential food-stamp recipients and certain labor unions against the Secretary of Agriculture (the

Secretary), challenging the constitutionality of Section 6(d)(3) of the Act, 7 U.S.C. 2015(d)(3). That Section generally provides that a household may not become eligible for food stamps—of, if already eligible, may not receive an increased allotment of food stamps—by reason of a decrease in household income occasioned by the fact that any member of the household is on strike.

The United States District Court for the District of Columbia held that Section 2015(d)(3) is unconstitutional and enjoined its enforcement. The court held that the statute violates the First Amendment rights of strikers to associate with their families and with other union members. The court also held that Section 2015(d)(3) violates equal protection principles by creating a classification that discriminates against striking employees. The Secretary seeks direct review, pursuant to 28 U.S.C. 1252, of the district court's unprecedented decision.

1. The Food Stamp program is a federally-funded, state-administered effort to "permit low-income households to obtain a more nutritious diet through normal channels of trade by increasing food purchasing power." 7 U.S.C. 2011. Households with aggregate income and financial resources below specified national standards are eligible to participate. 7 U.S.C. (& Supp. III) 2014. Participating households receive coupons (food stamps) that can be used for food purchases at retail stores. 7 U.S.C. (& Supp. III) 2013. Nearly 21 million persons resided in households that received food stamps in 1984. The resulting federal outlay was in excess of $10 billion. See Bureau of the Census, U.S. Dep't of Commerce, *Statistical Abstract of the United States 1986,* at 122 (106th ed.).

In addition to establishing an income threshold, the Food Stamp Act prescribes several eligibility requirements designed to ensure that finite government funds are available to those who are most in need. For example, Sec-

tion 2015(d)(1) withholds food stamps from households in which an otherwise qualified person refuses to register for employment, refuses to provide information about his employment, or refuses to accept employment at particular wages. 7 U.S.C. (& Supp. III) 2015(d)(1)(i), (ii) and (iv). Section 2015(d)(1)(iii) makes ineligible for 90 days a household whose head voluntarily quits a job without good cause. And 7 U.S.C. (& Supp. III) 2029 permits the states to disqualify certain households whose members refuse to participate in "workfare programs." See also 7 U.S.C. 2015(b) (disqualification for engaging in fraud and misrepresentation about food-stamp eligibility).

Consistent with its policy of ensuring that limited federal funds remain available to assist the neediest households, Congress amended the Act in 1981 to prescribe new eligibility requirements for households with members unemployed because of strikes. Omnibus Budget Reconciliation Act of 1981 (OBRA), Pub. L. No. 97-35, § 109, 95 Stat. 361. This amendment is now codified at 7 U.S.C. 2015(d)(3).[1] It generally provides that "a household shall not participate in the food stamp program at any time that any [otherwise-qualified] member of such household * * * is on strike." A proviso states that a household already eligible for food stamps shall not lose its eligibility if one of its members goes on strike, but that "such household shall not receive an increased allotment as the result of a decrease in the income of [its] striking member or members."

The 1981 amendment was designed to promote three distinct goals. The first and foremost of these goals was a reduction in the cost of the Food Stamp program. Section 2015(d)(3), as amended, was part of a package of

[1] The 1981 amendment was originally codified at 7 U.S.C. (Supp. V 1981) 2015(d)(4). Section 2015(d)(4) was redesignated as Section 2015(d)(3) by the Omnibus Budget Reconciliation Act of 1982, Pub. L. No. 97-253, § 190(b), 96 Stat. 787.

across-the-board budget cuts whose purpose was to effect "dramatic changes in Federal spending policy * * * necessary in order to wage an effective battle against the high inflation and unemployment which have plagued the national economy for many years." S. Rep. 97-139, 97th Cong., 1st Sess. 3 (1981). Indeed, the 1981 amendment to Section 2015(d)(3) was only one of many changes in the Food Stamp Act enacted by OBRA in an effort to achieve significant budgetary savings. See, *e.g.*, Pub. L. No. 97-35, § 101(a), 95 Stat. 358, 7 U.S.C. 2012(i) (providing that parents and children who live together shall comprise a single household for food stamp purposes); Pub. L. No. 97-35, § 104(a), 95 Stat. 358, 7 U.S.C. 2014(c)(2) (establishing new gross income eligibility standard). See generally S. Rep. 97-139, *supra*, at 52-53, 55-57. In deciding to enact the 1981 amendment to Section 2015(d)(3), Congress determined that over the three-year period from 1982 to 1984 the provision would reduce the total cost of the Food Stamp program by approximately $165 million. S. Rep. 97-139, *supra*, at 63. See also *id.* at 119 (detailing administrative savings expected to result from the amendment).

Secondly, by significantly restricting the availability of food stamps to households that included strikers, Congress sought to promote "the underlying policy of tying receipt of food stamps to the ability and willingness to work, as exemplified by provisions requiring work registration, denying benefits to those voluntarily quitting a job without good cause, and allowing the establishment of workfare programs." S. Rep. 97-139, *supra*, at 62. Unlike needy persons without job opportunities, Congress determined that "[a] person who leaves his job to go on strike has given up the income from the job of his own volition." *Ibid.* And Congress concluded that "[u]nion

strike funds should be responsible for providing support and benefits to strikers during labor-management disputes." *Ibid.*

Finally, Congress believed that the 1981 amendment would help promote the appearance of governmental neutrality in labor disputes. According to the Senate Report, providing food stamps to striking workers could "be seen as encouragement to workers to 'wait out' management, rather than compromise." S. Rep. 97-139, *supra,* at 62. Congress was particularly concerned about strikes by public employees, who under previous law might receive food stamps "even though the strikes in which they [were] participating [were] illegal." *Ibid.*

2. Appellees are two labor unions and several individual union members. On October 29, 1984, they filed this action in the United States District Court for the District of Columbia, challenging the constitutionality of Section 2015(d)(3) and seeking declaratory and injunctive relief. On September 30, 1985, the district court denied the Secretary's motion to dismiss the complaint (App., *infra,* 17a-47a). The parties thereafter conducted discovery and filed cross-motions for summary judgment.

On November 14, 1986, the court granted appellees' motion for summary judgment and issued a declaratory judgment (App., *infra,* 1a-16a). The district court acknowledged (*id.* at 10a) that Section 2015(d)(3) "is, in one sense, rationally related to legitimate legislative objectives—requiring a person able to work to do so in order to receive food stamps and promoting government neutrality in strikes." Nevertheless, identifying five deficiencies in the statute, the court held it unconstitutional.

First, the court found that the statute "interferes or threatens to interfere with the First Amendment right of the individual plaintiffs to associate with their families, with their union, and with fellow union members, as well as the reciprocal First Amendment right of each union

plaintiff to its members' association with the union." App., *infra,* 11a (citations omitted). Second, relying on this Court's decisions in *Abood* v. *Detroit Bd. of Education,* 431 U.S. 209 (1977), and *Sherbert* v. *Verner,* 374 U.S. 398 (1963), the court determined that "[t]he statute as administered interferes with strikers' right to express themselves about union matters free of coercion by the government." App., *infra,* 11a. Third, the court stated that strikers as a group have historically "been subject to discrimination," possess "obvious and distinguishing characteristics," and have "frequently been in the stance of an unpopular political minority." *Id.* at 12a. The court accordingly suggested that strikers should be considered a suspect or quasi-suspect class for equal-protection purposes. Fourth, the court discerned in the statute (*id.* at 13a) "significant and discriminatory differences between the treatment accorded a striker who stops work in concert with others and an individual who quits a job." As a result, the court stated that one of the rationales advanced by Congress for Section 2015(d)(3)—the desire to tie the receipt of food stamps to the willingness to work—was "seriously weakened" (App., *infra,* 13a).

Finally, in an analysis that the court termed "critical to [its] appraisal of rationality," the court stated that Section 2015(d)(3) "impermissibly strikes at the striker through his family." App., *infra,* 13a. In the district court's view, "[n]either administrative convenience nor the desirability of maintaining government neutrality in labor disputes justifies the denial of food stamps to innocent members of a striker's household if this legislative purpose could be achieved by more narrowly tailored measures." The court surmised that "[a]djusting the food stamp allotment to exclude the striker would be neither difficult nor intrusive." *Id.* at 14a. It accordingly held that the statute, "when considered in light of its impact on the constitutional rights of the plaintiffs and on innocent members of the families of

the individual plaintiffs, is not sufficiently tailored to the objectives stated by its defenders to pass constitutional muster." *Id.* at 15a. The court issued an order granting a declaratory judgment consistent with this decision (*id.* at 71a-72a).

On December 22, 1986, the district court granted appellees interim injunctive relief (App., *infra*, 48a-50a). In relevant part, the court enjoined the Secretary (*id.* at 48a-49a) "pending further orders of this Court or the Supreme Court, from enforcing the provisions of 7 U.S.C. § 2015(d)(3) and its implementing regulations to disqualify class members from participation in the Food Stamp program when they are determined by a state or local Food Stamp agency to meet the other eligibility requirements of the Food Stamp Act."[2]

THE QUESTION IS SUBSTANTIAL

The district court has held unconstitutional a carefully considered provision of the Food Stamp Act, whose evident purpose is to allocate finite resources to those most in need of government assistance. Applying a loose amalgam of heightened and rational-basis scrutiny, the district court held that Section 2015(d)(3) impinges on fundamental rights of free speech and association, burdens a suspect class, and irrationally discriminates against striking workers. The court's analysis is flawed at every turn. It ignores settled equal protection principles and improperly second-guesses the complex choices made by Congress when it amended the Food Stamp Act. The result cannot be reconciled with this Court's decisions and reflects a

[2] On the same day, the district court also granted class certification (App., *infra*, 66a-70a) and ordered the union appellees to furnish a bond in an amount sufficient to cover the Secretary's costs of food stamps provided under the injunction pending appeal (*id.* at 50a).

marked lack of deference to "the duly enacted and carefully considered decision of a coequal and representative branch of our Government." *Walters* v. *National Ass'n of Radiation Survivors*, No. 84-571 (June 28, 1985), slip op. 13. The question presented is therefore substantial. Indeed, because the principles governing the constitutionality of this sort of legislation have been settled by recent decisions of this Court, the Court may wish to consider summary reversal.

1. Equal protection principles generally require that legislation accord like treatment to similarly situated individuals. See, *e.g.*, *City of Cleburne* v. *Cleburne Living Center, Inc.*, No. 84-468 (July 1, 1985), slip op. 6; *Plyler* v. *Doe*, 457 U.S. 202, 216 (1982). But the precept of equal protection does not preclude legislators from making rational distinctions. "A legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the [government] to remedy every ill." *Plyler* v. *Doe*, 457 U.S. at 216. Particularly in cases involving social welfare programs—where Congress must "make many distinctions among classes of beneficiaries while making allocations from a finite fund" (*Bowen* v. *Owens*, No. 84-1905 (May 19, 1986), slip op. 5)—the judiciary must give broad deference to the choices of Congress, "the appropriate representative body through which the public makes democratic choices among alternative solutions to social and economic problems." *Schweiker* v. *Wilson*, 450 U.S. 221, 230 (1981). A legislative choice is subjected to heightened scrutiny only if it "employs a classification that is inherently invidious or that impinges on fundamental rights." *Ibid.*

These principles confirm that Congress acted well within its powers in amending Section 2015(d)(3). Faced

with an overwhelming budget deficit and with ever-increasing demands on federal resources, Congress decided to "concentrate limited funds where the need [was] likely to be greatest." *Califano* v. *Boles*, 443 U.S. 282, 296 (1979); accord, *Bowen* v. *Owens*, slip op. 8. Congress concluded, quite reasonably, that households whose members are on strike have greater access to the means of self-support than households whose members are entirely without employment opportunities. In addition, Congress chose not to discourage striking employees from reaching reasonable accommodations with their employers; it therefore declined to provide, in the form of food stamps, the practical equivalent of strike benefits that it believed could ordinarily be paid from union funds.

In sum, the 1981 amendment to Section 2015(d)(3) addressed an array of legitimate governmental interests and did so in a way that cannot be described as "patently arbitrary or irrational." *United States Railroad Retirement Bd.* v. *Fritz*, 449 U.S. 166, 177 (1980). The statute thus easily meets the traditional "rational basis" test applied to public welfare programs. See *Weinberger* v. *Salfi*, 422 U.S. 749, 772 (1975); *Schweiker* v. *Wilson*, 450 U.S. at 230; *Vance* v. *Bradley*, 440 U.S. 93, 97 (1979); *Flemming* v. *Nestor*, 363 U.S. 603, 611 (1960). Every other court that has considered the constitutionality of Section 2015(d)(3) has held it valid on that basis. See *Ledesma* v. *Block*, No. G82-94 (W.D. Mich. Aug. 26, 1985), appeal pending, No. 85-1730 (6th Cir.); *United Steelworkers* v. *Block*, 578 F. Supp. 1417, 1421-1424 (D.S.D. 1982) (alternative holding).

2. The district court acknowledged (App., *infra*, 10a) that Section 2015(d)(3) is "rationally related to legitimate legislative objectives—requiring a person able to work to do so in order to receive food stamps and promoting

government neutrality in strikes."[3] The case should have ended upon that conclusion. Instead, the district court embarked upon a rudderless voyage into heightened scrutiny. In so doing, the court relied, indiscriminately, upon cases involving suspect classifications, gender discrimination, fundamental rights, and "rational basis" analysis. This jumble of loosely connected precedent cannot support the application of heightened scrutiny to the legislative classification effected by Section 2015(d)(3).

a. The court held, first, that "[t]he disputed limitation on food stamps for strikers interferes or threatens to interfere with the First Amendment right of the individual plaintiffs to associate with their families, with their union, and with fellow union members" (App., *infra*, 11a (cita-

[3] The district court at one point suggested that Congress's effort to justify Section 2015(d)(3) as an effort to tie receipt of food stamps to recipients' willingness to work was "seriously weakened" by what the court perceived to be "significant and discriminatory differences between the treatment accorded a striker who stops work in concert with others and an individual who quits a job" (App., *infra*, 13a; see *id.* at 44a-47a). This reasoning is flawed. To begin with, the distinctions that the statute draws between strikers and quitters (compare 7 U.S.C. (& Supp. III) 2015(d)(1)(iii) with 7 U.S.C. 2015(d)(3)) do not, as the district court suggested, uniformly disfavor strikers. For example, a striker who returns to his job is immediately eligible for food stamps; the quitter who finds a new job must still wait out a 90-day period of ineligibility. To the extent that the statute does disfavor strikers, Congress could reasonably conclude that strikers, who have a job waiting for them whenever they choose to return to it, are better off than quitters, who have no certain prospect of employment whatsoever. In any event, "[i]f the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' " *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970) (citation omitted). "[T]he drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one. Perfection in making the necessary classifications is neither possible nor necessary." *Massachusetts Bd. of Retirement* v. *Murgia*, 427 U.S. 307, 314 (1976).

tions omitted)). This Court rejected a nearly identical contention in *Lyng* v. *Castillo,* No. 85-250 (June 27, 1986). That case involved a challenge to a provision of the Food Stamp Act that generally treated parents, children, and siblings who live together as a single "household" for purposes of determining need and eligibility for benefits. Applying heightened scrutiny, the district court had concluded that this provision infringed the rights of family members to associate with one another. In reversing, this Court upheld the statutory classification because it did not " 'directly and substantially' interfere with family living arrangements and thereby burden a fundamental right" (slip op. 3 (citation omitted)). In particular, the Court observed, the provision defining "household" did not "order or prevent any group of persons from dining together" (*id.* at 4). And the Court found it "exceedingly unlikely that close relatives would choose to live apart simply to increase their allotment of food stamps" (*ibid.*).

The Court's analysis in *Castillo* squarely disposes of appellees' First Amendment "associational" claim. By limiting the availability of food stamps to households that include strikers, Congress did not "directly and substantially interfere" with family members' ability to associate with each other. Nor did Congress directly interfere with union members' ability to associate with their union. See *Florida AFL-CIO* v. *Florida Dep't of Labor & Employment Security,* 676 F.2d 513, 516 (11th Cir. 1982) (rejecting First Amendment challenge to state statute that withheld unemployment compensation from workers who quit their job upon expiration of labor contracts). And there is no more reason here than in *Castillo* to believe that families "will choose to live apart," or that workers will resign from their union, in order to acquire food stamps.[4]

[4] In fact, Section 2015(d)(3) imposes even fewer pressures on households to separate than did the statutory provision upheld in *Castillo.* Here, the eligibility limitation applies only as long as the household member remains on strike. In *Castillo,* by contrast, the definition of "household" imposed a permanent limitation on the availability of food stamps to households made up of close relatives.

b. The district court also concluded that Section 2015(d)(3) abridges union members' First Amendment freedom of expression (App., *infra,* 11a-12a). The court reasoned (*id.* at 11a) that in order to qualify for food stamps, striking workers may find it necessary to "pressure their union to reach a settlement." Relying on this Court's decisions in *Abood* v. *Detroit Bd. of Education,* 431 U.S. 209 (1977), and *Sherbert* v. *Verner,* 374 U.S. 398 (1963), the district court held that in this manner Section 2015(d)(3) "interferes with strikers' right to express themselves about union matters free of coercion by the government" (App., *infra,* 11a).

The district court's analysis ignores the fact that Section 2015(d)(3) does not prohibit union members from expressing their views. It simply refuses to fund the decision to strike. This Court has made it clear that while the Constitution "protect[s] against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom." *Harris* v. *McRae,* 448 U.S. 297, 317-318 (1980). "A refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity." *Id.* at 317 n.19. "It is one thing to say that a State may not prohibit [an activity] and quite another to say that such [activity] must * * * receive state aid." *Norwood* v. *Harrison,* 413 U.S. 455, 462 (1973). Accord, *e.g., Regan* v. *Taxation With Representation of Washington,* 461 U.S. 540, 545-546 (1983); *Maher* v. *Roe,* 432 U.S. 464 (1977); *Buckley* v. *Valeo,* 424 U.S. 1, 94-95 (1976); *Cammarano* v. *United States,* 358 U.S. 498 (1959). Cf. *Baker* v. *General Motors Corp.*, No. 85-117 (July 2, 1986), slip op. 16 (federal statutory right to authorize a strike does not preclude States from refusing to provide

unemployment compensation to those employees whose unemployment results from a strike to which they have contributed funds).

In this essential respect Section 2015(d)(3) is distinguishable from the statute involved in the *Abood* case. The statute there required public employees to contribute funds to employee unions, even though the unions used the funds to promote political objectives unrelated to their collective-bargaining responsibilities. The Court held the statute unconstitutional, observing that the law required public employees to support "an ideological cause [they] may oppose" (431 U.S. at 235). The statute challenged in *Abood* thus violated the principle "at the heart of the First Amendment * * * that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State" (*id.* at 234-235). Section 2015(d)(3), by contrast, does not require citizens to spend their money on political causes in which they do not believe. It simply withholds government funds from a class of households that Congress reasonably concluded have relatively less need of government assistance.

The *Sherbert* decision is equally inapposite. The Court there upheld a Free Exercise challenge to a state denial of unemployment compensation benefits to a Sabbatarian who refused to work on Saturdays. See also *Hobbie* v. *Unemployment Appeals Comm'n*, No. 85-993 (Feb. 25, 1987). But the Court has never extended the reasoning in *Sherbert* beyond the unique context "of a constitutionally imposed 'governmental obligation of neutrality' originating in the Establishment and Freedom of Religion Clauses of the First Amendment." *Maher* v. *Roe*, 432 U.S. at 474-475 n.8 (refusing to extend the holding in *Sherbert* to a claim that a state statute was unconstitutional because it denied funding for abortions). Compare *Harris* v. *McRae*, 448 U.S. at 317 n.19 (refusing to extend *Sherbert* to a claim that a federal statute was unconstitutional because it withheld Medicaid funding for abortions) with *Thomas* v. *Review Board*, 450 U.S. 707, 717-718 (1981)

(applying *Sherbert* to a state denial of unemployment compensation to a worker who quit his job for religious reasons).

c. The district court next held (App., *infra*, 12a-13a) that labor unions in general, and striking workers in particular, warrant special constitutional protection in that they have historically been "subject to discrimination" and possess "obvious and distinguishing characteristics." This Court has twice rejected that precise claim. In *City of Charlotte* v. *Local 660, Int'l Ass'n of Firefighters*, 426 U.S. 283 (1976), the Court sustained, under a rational-basis analysis, a city's refusal to withhold union dues from the paychecks of city firefighters. The Court specifically rejected the contention that "respondents' status as union members * * * is such as to entitle them to special treatment under the Equal Protection Clause" (*id.* at 286). Similarly, in *Ohio Bureau of Employment Services* v. *Hodory*, 431 U.S. 471 (1977), the Court rejected a constitutional challenge to a state statute that denied unemployment benefits to persons whose unemployment resulted from a labor dispute. The Court upheld the statute under a rational-basis standard, expressly finding (431 U.S. at 489) that "[t]he statute does not involve any discernible fundamental interest or affect with particularity any protected class." Accord, *Russo* v. *Kirby*, 453 F.2d 548, 551 (2d Cir. 1971) (rejecting First Amendment and equal protection challenges to state law denying welfare benefits to strikers); *Francis* v. *Davidson*, 340 F. Supp. 351, 362-363 (D. Md.) (three-judge court), aff'd mem., 409 U.S. 904 (1972) (rejecting equal protection challenge to state regulation denying AFDC benefits to families of striking workers).

Insisting, nevertheless, on some form of heightened scrutiny, the district court noted (App., *infra*, 13a) that "labor unions and strikers have been the beneficiaries of extensive legislation designed to ameliorate historic

discrimination against them." But the court drew exactly the wrong inference from this fact. Far from showing that heightened judicial solicitude is merited, a group's achievement of significant legislative success "belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary." *City of Cleburne* v. *Cleburne Living Center, Inc.*, slip op. 9. There is thus no basis whatever for the district court's suggestion that strikers are a "suspect" or "quasi-suspect" class.[5]

d. Finally, the court held (App., *infra*, 13a) that because Section 2015(d)(3) "cuts off food stamps not only from a striker but also from the entire household, including the striker's spouse and children," the statute must be "narrowly tailored" in order to survive constitutional scrutiny. The court's holding mischaracterizes the structure and purpose of the statute, as well as the practicalities of its administration. More fundamentally, the court's underlying premise—that legislative lines must be narrowly drawn when they have an impact on the welfare of family members—cannot be squared with traditional equal protection principles.

To begin with, the district court paid insufficient attention to the fact that Congress chose to award food stamps to *households*, not to individual family members. The Act

[5] For the same reason, the district court's reliance (App., *infra*, 12a-13a) on *Department of Argiculture* v. *Moreno*, 413 U.S. 528 (1973), is misplaced. In *Moreno* the Court held unconstitutional a 1971 definition of "household" that effectively denied food stamps to households that shared their income with one or more unrelated persons. The Court observed that the statute had been enacted out of animus against "hippies" and held that such "a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." 413 U.S. at 534 (emphasis in the original). The district court here, by contrast, acknowledged that Section 2015(d)(3) is "rationally related to legitimate legislative objectives." App., *infra*, 10a. And as we have explained above, strikers are not a politically unpopular or otherwise "suspect" class.

routinely provides that a household will lose its eligibility if one of its members performs, or fails to perform, certain acts. Thus, if any household member who is fit to work fails to register for work, or refuses to accept certain jobs, the entire household is disqualified from participation in the food stamp program. The same result follows if the head of a household voluntarily quits his job, or if any qualified member of a household refuses to participate in an approved "workfare" plan. In each of these situations, the "onus" of the statute may be said to fall, in the district court's words (App., *infra*, 13a), "as heavily on the innocent members of the family as it does on" the person who refuses to accept employment. But the district court did not suggest, and it could not credibly be suggested, that these provisions are therefore unconstitutional for want of being "narrowly tailored."

There is no logical basis for reaching a different result where, as here, a household's disqualification results from a member's refusal to accept employment by virtue of a strike. Section 2015(d)(3) can no more be said to "punish" a family for the conduct of a member who goes on strike than the provisions just described can be said to "punish" a family for the conduct of a member who refuses to work on other grounds. In positing a distinction between the two situations, the district court again hypothesized (App., *infra*, 13a) that strikers occupy a privileged constitutional status. But that hypothesis, as we have already explained, is erroneous.

The district court's further observation that "[a]djusting the food stamp allotment to exclude the striker would be neither difficult nor intrusive" (App., *infra*, 14a) is not only incorrect as a practical matter[6] but, more fundamen-

[6] Congress expressly found that the elimination of benefits to striking workers would reduce administrative costs. As the Senate report put it (S. Rep. 97-139, *supra*, at 119), "[b]ecause [strikers'] tenure in the program is temporary, their elimination will reduce the administrative expense of initiating and then terminating (usually within several months) eligibility."

tally, ignores basic equal protection principles. Legislative classifications need only be narrowly drawn when they impinge on fundamental interests or burden suspect classes. *Jones* v. *Helms*, 452 U.S. 412, 425 (1981); *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 51 (1973). In the absence of a basis for heightened scrutiny, "a classification is not deficient simply because the State could have selected another means of achieving the desired ends." *Clements* v. *Fashing*, 457 U.S. 957, 969 (1982). It is true that the eligibility requirement erected by Section 2015(d)(3), like the rest of the Act's eligibility requirements, may have an effect upon "innocent members of the family" (App., *infra*, 13a). But that is a feature of most social welfare legislation. It is the function of such legislation to "allocat[e] limited public welfare funds among the myriad of potential recipients." *Dandridge* v. *Williams*, 397 U.S. at 487. Inevitably, classifications will be drawn that, in one respect or another, may be said to disadvantage certain needy persons. But this Court has never found unconstitutional an otherwise rational statute that allocates social welfare benefits simply because the prescribed allocation has such disadvantageous effects.[7]

[7] The district court predicated its "narrow tailoring" requirement on this Court's decision in *Plyler* v. *Doe*, 457 U.S. 202 (1982), but that case simply will not bear such an expansive rendering. The Court in *Plyler* held unconstitutional a Texas statute that withheld funds for the education of children who were not legally admitted into the United States. In doing so, however, the Court made clear (457 U.S. at 221) that education is not "merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation." To the contrary, the Court noted (*id.* at 223) that the denial of an education—unlike the denial of routine welfare benefits—"imposes a lifetime hardship" and a "stigma of illiteracy [that] will mark [the children] for the rest of their lives." Only by ignoring the explicit rationale of the Court in *Plyler* could the district court find support for its reasoning here.

3. The Food Stamp Act establishes a national program to supplement the nutritional needs of large numbers of American households. Over $10 billion in food stamp benefits were distributed in 1984, to households comprising nearly 21 million persons. In 1981, when it amended Section 2015(d)(3), Congress sought to sustain that national effort, by conserving limited federal resources and channeling those funds to households in greatest need of financial assistance. The district court's invalidation of Section 2015(d)(3) impairs that effort. And in so doing, its decision raises important questions about the appropriate measure of deference to legislative judgment.

CONCLUSION

Probable jurisdiction should be noted. The Court may wish to consider summary reversal.

Respectfully submitted.

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MARCH 1987

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 84-3303

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, ET AL., PLAINTIFFS,

v.

RICHARD A. LYNG, SECRETARY, U.S. DEPARTMENT OF AGRICULTURE, DEFENDANT.

[Filed NOV 14 1986]

MEMORANDUM

I.

As described more fully in a Memorandum filed September 30, 1985,[1] this matter involves a challenge to the constitutionality of a 1981 amendment[2] to the Food Stamp Act of 1977.[3] That amendment precludes a household from becoming eligible for food stamps if a member of that household is on strike because of a labor

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[1] A copy is attached hereto and hereinafter referred to as "1985 Memorandum."

[2] 7 U.S.C. § 2015(d)(3). Hereinafter sometimes referred to as the "striker amendment."

[3] 7 U.S.C. §§ 2011-2029.

dispute.[4] According to a Senate Committee report, the amendment is designed to promote government neutrality in labor disputes and to promote the food stamp program's "underlying policy of tying receipt of food stamps to the ability and willingness to work." S. Rep. No. 139, 97th Cong., 1st Sess. 62 (1981).

Food stamps are issued not to an individual but to a household, consisting of the persons who normally purchase food and eat together. The law presumes that a close family of husband, wife and children purchase food and eat together. *See Lyng v. Castillo*, 106 S. Ct. 2727 (1986). As a result, the striker amendment has the effect of denying food stamps not only to a striker, but also to anyone with whom the striker actually or presumptively purchases and shares food.

Plaintiffs are two unions and several individual union members[5] who have been ineligible for food stamps be-

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[4] In full, the amendment provides:

> Notwithstanding any other provision of law, a household shall not participate in the food stamp program at any time that any member of such household, not exempt from the work registration requirements of paragraph (1) of this subsection, is on strike as defined in section 142(2) of Title 29, because of a labor dispute (other than a lockout) as defined in section 152(9) of Title 29: *Provided*, That a household shall not lose its eligibility to participate in the food stamp program as a result of one of its members going on strike if the household was eligible for food stamps immediately prior to such strike, however, such household shall not receive an increased allotment as a result of a decrease in the income of the striking member or members of the household: *Provided further*, That such ineligibility shall not apply to any household that does not contain a member on strike, if any of its members refuses to accept employment at a plant or site because of a strike or lockout.

7 U.S.C. § 2015(d)(3), as amended by § 109 of the Omnibus Budget Reconciliation Act of 1981. *See also* 7 C.F.R. § 273.1(g) (1985).

[5] The union plaintiffs are International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, and United Mine Workers of America. The individual plaintiffs are Mary Berry, Johnie B. Blake, Barm Combs, Patricia Ann Combs, Mark Dyer and Geneva Dyer. First Amended Complaint (filed November 7, 1984) at ¶¶ 3-11.

cause they are or have been on strike. They have challenged the striker amendment as unconstitutionally violative of their due process, equal protection, and First Amendment rights. Their original pleadings sought a preliminary injunction, but did not include any motion for summary judgment. Defendant moved to dismiss plaintiffs' complaint, but filed no other dispositive motion. The 1985 Memorandum denied defendant's motion to dismiss and plaintiffs' motion for a preliminary injunction, but, anticipating summary judgment motions, concluded:

> [O]nce plaintiffs establish the facts proffered about the effects of the anti-striker statute, they may well prevail on the merits of their claim that the anti-striker amendment violates rights guaranteed to plaintiffs by the First Amendment to associate with their families, their unions and fellow union members.

1985 Memorandum at 29. Since then, the parties have conducted extensive discovery and have filed cross-motions for summary judgment, accompanied by appropriate statements of undisputed material facts and statements of genuine issues. Plaintiffs' Motion for Summary Judgment (filed December 20, 1985); Defendant's Motion for Summary Judgment (filed February 24, 1986). Consideration of the issues thereby framed was delayed pending the Supreme Court's decision in *Lyng v. Castillo, supra*. After the *Lyng* opinion was rendered, the parties exchanged supplemental briefs addressing *Lyng*'s implications for this case. The cross-motions are now ripe for decision.

II.

The exchange of statements of undisputed facts which accompanied the cross-motions for summary judgment enables the Court to ratify and find the facts stated in the 1985 Memorandum and the following additional undisputed material facts:

1. The plaintiff labor unions are labor organizations which exist for the purpose, *inter alia*, of advancing the economic and political interests of their members. Plaintiffs' Statement of Material Facts [hereinafter "Plaintiffs' Statement"] at ¶ 1; Defendant's Statement of Genuine Issues [hereinafter "Defendant's Statement"] at ¶ 1.

2. The 1981 amendment to the Food Stamp Act of 1977 disqualifies households from obtaining food stamps if the household contains a member involved in a labor dispute, other than a lockout, unless the household was eligible for food stamps prior to the strike. Plaintiffs' Statement at ¶ 2; Defendant's Statement at ¶ 2.

A 1981 House Report of the House Agriculture Committee commented:

> In the 1977 Act, this Committee refused to eliminate strikers and the members of their households from consideration for participation [in the food stamp program] simply because they were on strike, since such an automatic exclusion seemed unfair and inequitable and would have involved the government in the non-neutral act of pressuring the worker to abandon the strike.

H. Rep. 97-106(I) at 142 (1981), cited in Plaintiffs' Brief in Support of Motion for Summary Judgment at 7 n.3. Congress passed the striker amendment and the President signed it, despite the House Committee's reservations.

3. A striker's household is disqualified for an indeterminate period, i.e., during the period of the strike. The disqualification has been administered in some cases to

deny eligibility to strikers and their households even after the strikers have been permanently replaced. Plaintiffs' Statement at ¶ 11; Defendant's Statement at ¶ 11.

4. In order to regain food stamp eligibility, strikers have the choice of leaving their households, abandoning a strike by returning to work, quitting their jobs, or attempting to persuade their unions to call off the strike. *See* 1985 Memorandum at 12; Plaintiffs' Statement at ¶¶ 2, 3; Defendant's Statement at ¶¶ 2, 3.

5. The individual plaintiff Mary Berry was denied food stamps solely due to her status as a striker on August 27, 1984. The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) and UAW Local 985 of which Mary Berry is a member, have conducted a strike at Plymouth Stamping Company from September 9, 1980 until the present in opposition to the employer's demands for concessions and in opposition to the unfair labor practices of the employer.[6] Plaintiffs' Statement at ¶ 4; Defendant's Statement at ¶ 4.

6. Individual plaintiff Mark Dyer *and his household* were denied food stamps in August, 1984, because of his status as a striker. Plaintiffs' Statement at ¶ 6; Defendant's Statement at ¶ 6.

7. Individual plaintiff Barm Combs *and his household* were denied food stamps in September, 1984, because of his status as a striker. Plaintiffs' Statement at ¶ 6; Defendant's Statement at ¶ 6.

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[6] Defendant does not know the reasons for the Plymouth strike, and does not refute plaintiff Mary Berry's statement that that strike is in opposition to unfair labor practices of the employer, but claims that the reasons are not relevant to a decision here. Defendant's Statement at ¶ 4. However, the distinction made by the striker amendment between strikers and voluntary quitters who are given a hearing and exemption if they quit a job because of unfair treatment is quite relevant. *See* Memorandum at 8, *infra*. Defendant's objection is overruled.

Dyer and Combs were engaged in a United Mine Workers of America (UMWA) selective strike beginning August 1, 1984, which lasted until April 2, 1985, in an attempt to gain recognition for UMWA and in opposition to the alleged unfair labor practices of the Brush Creek Coal Company, Inc., and its alter egos. *Compare* Plaintiffs' Statement at ¶ 7 *with* Defendant's Statement at ¶ 7.

8. Individual plaintiff Johnie Blake remained disqualified for food stamps even though her employer had replaced her and thereby foreclosed her opportunity to return to her job. *See* Affidavit of Johnie Blake at ¶ 10 (filed February 19, 1985).

9. Some individuals have been told by state agencies or have learned that they can avoid household disqualification by having the striker leave the household. *Compare* Plaintiffs' Statement at ¶ 9 *with* Defendant's Statement at ¶ 9.

10. Some strikers who have been denied food stamps have voted to ratify or accept collective bargaining agreements which were less favorable than they personally believed appropriate. These votes were motivated by lack of wages as a result of being on strike and out of work and, to a lesser degree, lack of food stamps. *Compare* Plaintiffs' Statement at ¶ 10 *with* Defendant's Statement at ¶ 10.

11. Barm Combs quit his strike at Brush Creek Coal Company and abandoned his union membership and thereafter received food stamps. Combs testified that:

> I believe that if I had gotten food stamps to help my family during the strike against Brush Creek Coal Company, I could have stayed on the picket line throughout the strike and would not have abandoned my union membership.

Affidavit of Barm Combs at 4. Moreover, he had to pay an initiation fee to the union when he eventually went back to work after the strike was over. Plaintiffs' Statement at

¶ 13; Defendant's Statement at ¶ 13. It is specifically found that the denial of food stamps to Comb's household was a proximate cause of his abandoning his association with his fellow strikers and his disassociation from his union.

12. Even though Donald Gibson, a member of the AFL-CIO, was permanently replaced by his employer, he was disqualifed from receiving food stamps solely because he was still a member of the union and still receiving strike pay from the union. *Compare* Plaintiffs' Statement at ¶ 12 *with* Defendant's Statement at ¶ 12.

13. Anthony Tracy, a member of AFL-CIO, left a picket line to seek other work and lost his union membership and strike benefits.[7] Plaintiffs' Statement at ¶ 13.

14. Under the constitutions of UAW and UMWA, a member who abandons a strike by crossing a picket line and returning to work can be subjected to charges, trial, and penalty, including expulsion from the union. Plaintiffs' Statement at ¶ 14; Defendant's Statement at ¶ 14.

15. In addition, as more fully stated in Appendix A attached to the 1985 Memorandum, there are substantial differences between the treatment accorded to strikers by operation of the 1981 amendment to the Food Stamp Act and the treatment accorded to employees who quit their jobs voluntarily and not in concert with others. For example, a striker's household remains disqualified as long as the striker is on strike. 7 C.F.R. § 273.1(g) (1985). The household of an individual voluntary quitter is disqualified for only 90 days, after which food stamp eligibility is restored if the quitter seeks other work and the household remains otherwise eligible. 7 C.F.R.

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[7] Defendant's objection to the testimony of Tracy's wife on hearsay grounds is without merit. She states that her affidavit is based on personal knowledge. Nor is Tracy's experience irrelevant just because he is neither a plaintiff nor a member of a union. He is a competent witness to the effect of the Food Stamp Program on strikers.

§ 273.7(n)(1)(v). Moreover, even the original 90-day disqualification does not apply if the quitter can show "good cause" for leaving work. The individual quitter is entitled to a good cause hearing. Good cause includes discrimination by an employer or unreasonable work conditions. 7 C.F.R. § 273.7(n)(3)(i), (ii). There is no provision for such a good cause hearing or exception for strikers. In addition, a household including a voluntary quitter becomes ineligible only if the quitter is the primary breadwinner. 7 C.F.R. § 273.7(n)(1)(iv). The presence of any striker in a household disqualifies the entire household.

III.

In support of the summary judgment motion, plaintiffs argue that the 1981 amendment (1) impairs the constitutional rights of the individual plaintiffs to associate with their families and unions in violation of the First Amendment, and (2) impairs these rights without rationally furthering a legitimate governmental purpose in violation of the Due Process clause of the Fifth Amendment.

The 1985 Memorandum, filed before the Supreme Court decided *Lyng*, anticipated that if plaintiffs proved what they alleged, they might well prevail on the merits. The threshold question at this stage of the proceeding, therefore, is whether *Lyng* established a standard of review which superceded that applied by the Supreme Court in *Department of Agriculture v. Moreno*, 413 U.S. 528 (1973), and relied upon in the 1985 Memorandum.

The *Lyng* plaintiffs challenged the constitutionality of the legislative presumption that parents, children and siblings who live together constitute a single "household" for food stamp purposes, whereas other groups of people, such as more distant relatives or groups of unrelated people, are treated as a household only if the members of the group customarily purchase food and prepare meals together. A lower court struck down this aspect of the

food stamp system on the ground that it discriminated against households of close relatives.

The *Lyng* Court determined that in that case the statutory definition of household should not be subjected to "heightened scrutiny" because close relatives are not a "suspect" or "quasi suspect" class. In this respect the Supreme Court noted that close family members have not as "a historical matter . . . been subjected to discrimination; they do not exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; and they are not a minority or politically powerless." 106 S. Ct. at 2729. Nor, said the Court, did the classification " 'directly and substantially' interfere with family living arrangements and thereby burden a fundamental right." 106 S. Ct. at 2729, *quoting Zablocki v. Redhail*, 434 U.S. 374, 387 (1978). Further, the Court assumed, without apparent benefit of individualized evidence or trial court findings, that the " 'household' definition does not order or prevent any group of persons from dining together" and that "in the overwhelming majority of cases it probably has no effect at all." 106 S. Ct. at 2730. The Court further assumed that

> It is exceedingly unlikely that close relatives would choose to live apart simply to increase their allotment of food stamps, for the cost of separate housing would almost certainly exceed the incremental value of the additional stamps.

106 S. Ct. at 2730.

The *Lyng* Court distinguished its earlier decision in *Moreno*. *Moreno* had held unconstitutional a 1971 definition of "household" which distinguished between households composed entirely of persons who are related to one another and households containing one or more members who are unrelated to the rest. The *Lyng* Court identified the vice of the 1971 definition at issue in *Moreno* to be the fact that it not only disqualified groups of

unrelated persons, but it also disqualified an otherwise eligible group of closely related persons solely because they shared their home with one or more unrelated persons. The *Lyng* Court also pointedly noted a House Committee observation that the proviso at issue in *Moreno* "was essentially an attempt to ban food stamp participation by communal households (so-called 'hippie communes')." *Lyng*, 106 S. Ct. at 2730 n.3.

Suggesting that "heightened scrutiny" was in order in neither the *Moreno* nor the *Lyng* situation, the *Lyng* Court concluded that the classification there at issue, unlike that considered in *Moreno*, was valid because it "is rationally related to a legitimate government interest" in administrative convenience. *Lyng*, 106 S.Ct. at 2730.

Insofar as the striker amendment denies food stamps to an individual striker, it is, in one sense, rationally related to legitimate legislative objectives—requiring a person able to work to do so in order to receive food stamps and promoting government neutrality in strikes. *See Califano v. Aznavorian*, 439 U.S. 170 (1978). However, as plaintiffs correctly suggest, even though "heightened scrutiny" may not be in order:

> A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'

Plaintiffs' Opposition at 4, quoting *Reed v. Reed*, 404 U.S. 71, 76 (1971), quoting *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920); *see also Mathews v. Lucas*, 427 U.S. 495, 510 (1976). *Cf. Western & Southern Life Insurance Co. v. State Board of Equalization of California*, 451 U.S. 648, 672 (1981); *Weinberger v. Salfi*, 422 U.S. 749, 772 (1975). Accordingly, as stated preliminarily in the 1985 Memorandum, application of

this standard to the undisputed facts developed in the exchange of summary judgment motions yields the following conclusions:

(1) The disputed limitation on food stamps for strikers interferes or threatens to interfere with the First Amendment right of the individual plaintiffs to associate with their families, *see Zablocki v. Redhail, supra,* with their union, *see Allee v. Medrano*, 416 U.S. 802, 819 n.13 (1974), and with fellow union members, *see NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 933 (1982); *Professional Association of College Educators v. El Paso County Community College District*, 730 F.2d 258 (5th Cir.), *cert. denied*, 105 S. Ct. 248 (1984), as well as the reciprocal First Amendment right of each union plaintiff to its members' association with the union. It may be that a striker would not live apart from close family members in order to provide them with food stamps. *See Lyng*, 106 S. Ct. at 2730. But as defendant has bluntly stated, the striker has, as an alternative to leaving his family, the further options of quitting his job or returning to work. Pursuit of either of these alternatives would obviously sever or at least threaten his association with his union and fellow union members. Indeed, that is exactly what has happened to plaintiff Combs. Denial of food stamps to his family was a proximate cause of this disassociation from a strike, his fellow strikers, and his union.

(2) The statute as administered interferes with strikers' right to express themselves about union matters free of coercion by the government. *See Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). The defendant states that it anticipates that plaintiffs whose personal resources are depleted by loss of wages *and* denial of food stamps as a result of being on strike "can pressure their union to reach a settlement." Defendant's Response to Question Nos. 3 and 4 of the Court's April 14, 1985 Notice to Counsel, and Reply to Plaintiffs' Response Thereto at 3

(filed June 28, 1985). As the Supreme Court stated in respect of infringement of the First Amendment's guarantee of religious freedom by denial of unemployment benefits to persons whose religious beliefs precluded Saturday work:

> Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand.

Sherbert v. Verner, 374 U.S. 398, 404 (1963). The same dynamic is present here and requires a conclusion that denial of food stamps to the individual plaintiffs violates that First Amendment right to associate and to express themselves freely in the course of that association.

(3) As previously stated, the *Lyng* Court conspicuously distinguished the family that was the plaintiff there from groups which have as "a historical matter . . . been subject to discrimination" or are frequently in the stance of an unpopular political minority. Indeed, *Lyng* can be read as distinguishing *Moreno*, in part at least, because of a hint of animus against "hippies" reflected in the legislative history of the food stamp provision, 7 U.S.C. § 2012(e), struck down by the *Moreno* Court. *Lyng*, 106 S. Ct. at 2730 n.3. Strikers are a group which, at least as "a historical matter," has "been subject to discrimination," may be defined as a discrete group by "obvious and distinguishing characteristics," and has frequently been in the stance of an unpopular political minority. *See generally*, 18 Encyclopaedia Britannica, *Trade Unionism* 563, 565-66 (1974). *Compare Lyng*, 106 S. Ct. at 2729. There is judicially noticeable scholarly work evidencing discrimination in the form of public and official hostility against labor unions in general and strikers in particular. *See, e.g.*,

18 Encyclopaedia Britannica, *supra*, at 565-66; I. Bernstein, *The Lean Years: A History of the American Worker, 1920-1933* (1960). Indeed, labor unions and strikers have been the beneficiaries of extensive legislation designed to ameliorate historic discrimination against them. *See, e.g.*, 29 U.S.C. § 104 (no injunction against ceasing or refusing to work) and 29 U.S.C. § 163 (preserving the right to strike). This history makes this case more nearly resemble *Moreno* than *Lyng*.

(4) As spelled out in Appendix A to the 1985 Memorandum and summarized in the findings, there are significant and discriminatory differences between the treatment accorded a striker who stops work in concert with others and an individual who quits a job. Defendant's justification of the striker amendment as a device to deny food stamps to persons able to work is seriously weakened by these disparities. *See* Memorandum at 8, *supra*.

(5) Finally, and critical to appraisal of rationality, the striker amendment impermissibly strikes at the striker through his family. *See Plyler v. Doe*, 457 U.S. 202, 220 (1982). For reasons of administrative convenience, food stamps are now issued to households, not to individuals. The striker amendment automatically cuts off food stamps not only from a striker but also from the entire household, including the striker's spouse and children. Legislation superimposing the striker provision onto the *household* stamp allocation system necessarily means that a striker who is a member of a household and who exercises his constitutionally protected rights to associate with his union and other members and to form and express his opinion about the merits of the strike sacrifices not only his own footstamps but also those of other members of his household, including infant children and the dependent elderly. In these circumstances, the "onus" of the striker's exercise of his associational rights falls as heavily on the innocent members of the family as it does on the

striker himself. Whether intended or not, "legislation directing the onus of a parent's misconduct against . . . [a spouse and] children does not comport with fundamental conceptions of justice." *Plyler v. Doe, supra,* at 220; *see also Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972).

Neither administrative convenience nor the desirability of maintaining government neutrality in labor disputes justifies the denial of food stamps to innocent members of a striker's household if this legislative purpose could be achieved by more narrowly tailored measures. *See Hobson v. Wilson*, 737 F.2d 1, 28 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 1843 (1985).[8] *See also Moreno, supra; United Steelworkers of America v. Johnson,* 799 F.2d 402 (8th Cir. 1986).

Adjusting the food stamp allotment to exclude the striker would be neither difficult nor intrusive. The current food stamp system requires the government to know the number of persons in a household in order to determine the value of the food stamps for which the household is eligible. *See Lyng*, 106 S. Ct. at 2730 n.4, citing S. Rep. No. 97-504, at 24, U.S. Code Cong. & Admin. News 1982 at 1662. Because of economies of scale, small households (one, two or three persons) are provided more food stamps per person than larger households. For example, current benefit levels are $70 for 1, $128 for 2, $183 for 3 person

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[8] In *Hobson*, the Court of Appeals stated:

> A line of Supreme Court cases . . . expressly established . . . that lawful associations and their members have the right to be protected from facially legitimate Government actions that would deter membership or otherwise thwart their efforts to associate and petition the Government for redress of their grievances. . . . unless the Government could demonstrate a substantial . . . or compelling . . . interest to justify the infringement, *and that the interest could not more narrowly be accommodated.*

737 F.2d at 28 (emphasis added).

households. *See Lyng*, 106 S. Ct. at 2370 n.4. Furthermore, existing procedures for administering the food stamp program necessarily require official knowledge of the striker's presence within the household. Administratively, it is as feasible to reflect in a household's food stamp allotment the presence of a striker as it is to reflect a decrease in the size of a household. In fact, the system now permits a striker's immediate family to receive an adjusted allotment of food stamps if the striker leaves the household; the system could, with equal ease, permit the immediate family of a striker who stayed at home but continued on strike, to receive a similar adjusted allotment. The obvious feasibility of a tailored plan requires the conclusion that administrative convenience does not justify denial of food stamps to an entire household solely because one member of it engages in a strike. Nor does the government interest in neutrality in labor disputes justify putting the onus of the striker's conduct on his family when entitlement to food stamps would be restored if the striker left his family, or his family left him.

The foregoing requires the conclusion that the striker amendment as administered, when considered in light of its impact on the constitutional rights of the plaintiffs and on innocent members of the families of the individual plaintiffs, is not sufficiently tailored to the objectives stated by its defenders to pass constitutional muster.

Accordingly, an accompanying order will declare that defendant may not lawfully withhold food stamps from any individual plaintiff's household solely because the household includes a striker for the reason that the striker amendment as administered violates rights guaranteed to plaintiffs by the First and Fifth Amendments to the Constitution. No injunction will issue at this time in the expec-

tation that when this judgment becomes final the defendant will honor it without compulsion.

Date: November 14, 1986

/s/ LOUIS F. OBERDORFER
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 84-3303

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, ET AL., PLAINTIFFS,

v.

JOHN R. BLOCK, SECRETARY, U.S. DEPARTMENT OF AGRICULTURE, DEFENDANT.

[Filed SEP 30 1985]

MEMORANDUM

I.

At issue here is the constitutionality of a 1981 amendment (7 U.S.C. § 2015(d)(3)) to the Food Stamp Act of 1977 (7 U.S.C. §§ 2011-2029)), which generally precludes a family from becoming eligible for food stamps when a member of the family is also a member of a union which is on strike, i.e., the member has participated in a "concerted interruption [of an employer's] operations by employees." 7 C.F.R. § 273.1(g)(2) (1985). Plaintiffs are the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), United Mine Workers of America (UMWA), individual members of those unions who are on strike in the midwest and in Kentucky respectively, and members of those

strikers' families.[1] They sue the Secretary of Agriculture in his official capacity as the official responsible for administration of the food stamp program.

Section 6(d)(4) of the Food Stamp Act of 1977, 7 U.S.C. § 2015(d)(3), as amended by § 109 of the Omnibus Budget Reconciliation Act of 1981, provides:

> Notwithstanding any other provision of law, a household shall not participate in the food stamp program at any time that any member of such household, not exempt from the work registration requirements of paragraph (1) of this subsection, is on strike as defined in section 142(2) of Title 29, because of a labor dispute (other than a lockout) as defined in section 152(9) of Title 29: *Provided*, That a household

[1] Plaintiffs allege specific injuries suffered by them due to the application of the striker disqualification provision. For example, plaintiff Mary Berry's only income during this strike is allegedly $85 per week in UAW strike insurance benefits, and medical insurance also paid for by the union. Her monthly expenses exceed this amount. During the strike she has used up her savings and sold off her personal property to pay her expenses and those of her teenage son. In April, 1981, she moved out of her apartment because she was no longer able to pay the rent. At that time, she moved to a rental room and voluntarily gave up custody of her son to her ex-husband because she could no longer pay to support him. Her son now continues to live with his father. Berry applied for food stamps on August 27, 1984, and her application was denied that same day because of her status as a striker. Declaration of Mary Berry (filed Jan. 10, 1985).

Plaintiff Johnie B. Blake's household nonexempt assets are allegedly less than $1500. The household's total monthly income for seven people is $1010. This amount does not cover the household's expenses. Blake has numerous unpaid hospital bills. Her gas was turned off because of unpaid bills. She also owes payments on her water bill, her sewage bill, and on her mortgage payment. In about July, 1984, Blake and her household were denied food stamps because she was on strike. Since the filing of this law suit, Blake has begun receiving food stamps because the UAW ended the strike at her plant. Declaration of Johnie B. Blake (filed Jan. 10, 1985); Supplemental Declaration of Johnie B. Blake (filed Feb. 11, 1985).

> shall not lose its eligibility to participate in the food stamp program as a result of one of its members going on strike if the household was eligible for food stamps immediately prior to such strike, however, such household shall not receive an increased allotment as a result of a decrease in the income of the striking member or members of the household: *Provided further*, That such ineligibility shall not apply to any household that does not contain a member on strike, if any of its members refuses to accept employment at a plant or site because of a strike or lockout.

The federal regulations which implement this amendment provide for striker disqualification from food stamps in substantially the same words.[2] Congress's purpose was

[2] The regulation reads:

> (g) *Strikers.* (1) Households with striking members shall be ineligible to participate in the Food Stamp Program unless the household was eligible for benefits the day prior to the strike and is otherwise eligible at the time of application. However, such a household shall not receive an increased allotment as a result of a decrease in the income of the striking member(s) of the household.
>
> (2) For food stamp purposes, a striker shall be anyone involved in a strike or concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slowdown or other concerted interruption of operations by employees. Any employee affected by a lockout, however, shall not be deemed to be a striker. Further, an individual who goes on strike who is exempt from work registration, in accordance with § 273.7(b), the day prior to the strike, other than those exempt solely on the grounds that they are employed, shall not be deemed to be a striker. Examples of non-strikers who are eligible for participation in the program include but are not limited to:
>
> (i) Employees whose workplace is closed by an employer in order to resist demands of employees (e.g., a lockout);
>
> (ii) Employees unable to work as a result of striking employees (e.g., truckdrivers who are not working because

stated by the Senate Committee:

> Granting benefits to strikers can be seen as encouragement to workers to "wait out" management rather than compromise.
>
> . . . .
>
> [D]enying benefits (or denying increased benefits) to households containing members on strike is consistent with the underlying policy of tying receipt of food stamps to the ability and willingness to work, as exemplified by provisions requiring work registration, denying benefits to those voluntarily quitting a job without good cause, and allowing the establishment of workfare programs.
>
> A person who leaves his job to go on strike has given up the income from the job of his own volition.

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striking newspaper pressmen prevent newspapers from being printed); and

(iii) Employees who are not part of the bargaining unit on strike who do not want to cross a picket line due to fear of personal injury or death.

(3) Pre-strike eligibility shall be determined by considering the day prior to the strike as the day of application and assuming the strike did not occur.

(4) Eligibility at time of application shall be determined by comparing the striking member's income before the strike (as calculated for paragraph (g)(3) of this section) to the striker's current income and adding the higher of the two to the current income of nonstriking members during the month of application. To determine benefits (and eligibility for households subject to the net income eligibility standard), deduction shall be calculated for the month of application as for any other household. Whether the striker's pre-strike earnings are used or his current income is used, the earnings deduction shall be allowed if appropriate.

(5) Strikers whose households are eligible to participate under criteria in § 273.1(g) shall be subject to the work registration requirements under § 273.7 unless exempt under § 273.7(b) the day of application.

7 C.F.R. § 273.1(g) (1985).

> A person making such a choice and participating in a strike must bear the consequences of his decision without assistance from the food stamp program.

S. Rep. No. 139, 97th Cong., 1st Sess. 62 (1981).

The complaint (as amplified by plaintiffs' briefs) alleges that the food stamp program was intended by Congress to alleviate hunger and malnutrition by increasing the food purchasing power of low income households, with need determined pursuant to national eligibility standards of household size, income and resources. The plaintiffs assert that treatment of strikers pursuant to the 1981 anti-striker amendment is punitive and irrational when compared to treatment of other "voluntarily poor" such as students and persons who quit their jobs individually, as distinguished from quitting in concert or association with fellow employees. For example, they allege that

> [i]n no case, other than a striker's, is an entire household which is otherwise eligible prevented from indefinitely participating in the Food Stamp program as a result of the act of a single household member.

First Amended Complaint for Declaratory and Injunctive Relief [First Amended Complaint] (filed Nov. 7, 1984) at ¶ 22. They claim that exclusion of strikers and their households from the food stamp program is not rationally related to its purpose and impedes the right of the union and the individual union member plaintiffs to organize and freely associate for the purpose of collective bargaining, including economic strikes and strikes against the unfair labor practices of employers.

Specifically, the complaint contains three counts. Plaintiffs first allege a violation of due process in that denial of food stamps to strikers because of their status as strikers is not rationally related to the purposes of the Act. The complaint next invokes the equal protection clause of the Constitution because strikers and their households are treated

differently from all other "voluntarily poor" households. Finally, the complaint charges that the amendment violates plaintiffs' First Amendment rights of association to form and join unions for the purpose of engaging in collective bargaining, including the conducting of strikes to implement their bargaining position. For relief, plaintiffs ask for class certification,[3] for a declaratory judgment that the anti-strikers provision is unlawful, for injunctions barring further implementation of the 1981 amendment and requiring retroactive payments to plaintiffs who would have been eligible for food stamps but for the application of the 1981 amendment, and for attorney's fees and costs for prosecuting the action.

Defendant moves to dismiss on the ground essentially that Congress's policy choice of barring food stamps for strikers was well within its constitutional prerogatives and the distinction drawn between strikers and other food stamp beneficiaries is not irrational. The matter is before the Court on defendant's motion to dismiss and plaintiffs' application for a preliminary injunction.[4]

II.

A.

In support of his motion to dismiss, defendant invokes precedents which limit judicial scrutiny of compliance of

[3] They seek class certification on the grounds that some 6000 other UAW members are on strike, some portion of whom remain without access to food stamps due to the operation of the striker disqualification provision. Memorandum of Law in Support of Plaintiffs' Motion for Class Certification at 2 (filed Jan. 10, 1985).

[4] Although both parties have supplemented their pleadings with substantial proffers of fact, no party has moved for summary judgment.

social welfare legislation with due process requirements,[5] urging that the same "rational basis" standard applies where the challenge is on equal protection grounds.[6] Defendant relies heavily upon a three-judge district court decision upholding a state statute which denied Aid to Families with Dependent Children to families where the father was on strike, which was summarily affirmed by the Supreme Court.[7] Defendant also relies upon a lower court decision which rejected an equal protection challenge to local laws denying welfare benefits to strikers and their

[5] *E.g., Califano v. Aznavorian*, 439 U.S. 170, 174 (1978):

> Social welfare legislation, by its very nature, involves drawing lines among categories of people, lines that necessarily are sometimes arbitrary. The Court has consistently upheld the constitutionality of such classifications in federal welfare legislation where a rational basis existed for Congress' choice.

[6] Both plaintiffs and defendant fail, in their pleadings, to distinguish inquiry under the due process and equal protection clauses. Their focus is rather on whether the amendment passes scrutiny under the rational basis test, which they agree applies to both the due process and equal protection claims. Consequently, in reciting the parties' allegations, the Court will recite them as presented – with little distinction between the two different claims.

[7] Defendant quotes *Francis v. Davidson*, 340 F. Supp. 351, 367 (D. Md.), *aff'd. mem.*, 409 U.S. 904 (1972). The district court was

> . . . of the opinion that rational bases exist for Maryland's position denying AFDC-E benefits to children of fathers who are out of work because of labor disputes . . . Thus, the equal protection challenge to Maryland's denial of benefits to such fathers must be rejected.

In fact, the district court in *Francis disapproved* the statute at issue which denied social welfare benefits to striking fathers. The district court grounded its decision primarily on the fact that the Maryland statute at issue violated federal statutes and regulations regarding AFDC benefits. The Supreme Court affirmed without opinion. The constitutional issue was not clearly before it.

families,[8] and the case of *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471 (1977), where the Supreme Court upheld a statute which denied unemployment benefits to workers on strike.

Defendant characterizes the rational basis test as a "minimal scrutiny standard," and argues that the amendment at issue here must be upheld if it is "rationally related to a legitimate legislative objective." *Weinberger v. Salfi*, 422 U.S. 749, 772 (1975). Defendant then alleges that the striker provision of the Food Stamp Act has two specific, legitimate goals. The first goal is to ensure that receipt of food stamps is tied to "the ability and willingness to work, as exemplified by provisions requiring work registration, denying benefits to those voluntarily quitting a job without good cause, and allowing the establishment of workfare programs." Defendant's Points and Authorities in Support of Defendant's Motion to Dismiss and in Opposition to Plaintiff's [sic] For a Preliminary Injunction [Defendant's Points and Authorities] at 14 (filed Jan. 31, 1985), *quoting* S. Rep. No. 139, 97th Cong., 1st Sess. 62 (1981). According to the government:

> A person who leaves his job to go on strike has given up the income from the job of his own volition. A person making such a choice and participating in a strike must bear the consequences of his decision without assistance from the food stamp program.

Id. Defendant further argues that, as to the "willingness to work" goal, it is rational to distinguish between strikers and other voluntary quitters:

> Strikers . . . retain the unilateral ability to return to work at any time. They not only have become voluntarily unemployed but also, in a real sense, they have

[8] *Russo v. Kirby*, 453 F.2d 548, 551 (2d Cir. 1971) ("[T]he basis of classification is clearly not unreasonable").

> a standing offer from their employers to return to work. Just as a person who voluntarily quits his former job loses food stamp eligibility by turning down a genuine offer of employment, a striker is not eligible under § 2015 because he is voluntarily idled by his refusal to report to work.

Defendant's Points and Authorities at 16.

Defendant argues that the second legitimate goal of the striker disqualification provision is to promote government neutrality in labor disputes. Defendant quotes a Senate report to say:

> Granting benefits to strikers can be seen as encouragement to workers to "wait out" management rather than compromise.

S. Rep. No. 139, 97th Cong., 1st Sess. 62 (1981). Defendant then concludes his challenge to plaintiffs' equal protection claim by emphasizing his view that the rational basis inquiry to be applied here is a very limited one. According to defendant, it is only necessary that Congress "rationally could have believed" that the amendment at issue would promote its objectives. *See Western & Southern Life Insurance Company v. State Board of Equalization of California*, 451 U.S. 648, 672 (1981). Defendant thus argues:

> Under this test, the challenged statute easily passes constitutional muster. Even the plaintiffs must concede that Congress rationally could have believed that § 2015(d)(4) [sic] would promote government neutrality in labor disputes. It is certainly not illogical to assume, as did Congress, that the availability of food stamps may serve as an encouragement to a striker to " 'wait out' management rather than compromise." S. Rep. 97-139 at 62. Whether this objec-

> tive has actually been achieved is, contrary to plaintiffs' contentions, simply irrelevant.

Defendant's Points and Authorities at 18-19.

In response to the first amendment claim, defendant seeks to distinguish between plaintiffs' "right to engage in certain labor activities" and a "right [to] compel the federal government to provide funds to support its exercise." Defendant's Points and Authorities at 2. Defendant argues that plaintiffs' contention that the striker amendment violates the First Amendment "is wrong for the simple reason that § 2015(d)(3) does not regulate speech or association, and therefore does not *abridge* the rights to speak or associate within the meaning of the First Amendment." Defendant's Response to Question Nos. 3 and 4 of the Court's April 14, 1985 Notice to Counsel, and Reply to Plaintiffs' Response Thereto [Defendant's Response to Question Nos. 3 and 4] at 5 (filed June 28, 1985) (emphasis in original). Defendant emphasizes that the striker amendment "does not violate the First Amendment because it restricts only the *government benefits available* to fund First Amendment activities, and not the activities themselves." *Id.* at 6 (emphasis in original). According to defendant, the striker disqualification provision "simply reflects Congress' judgment not to provide financial support to strikers through the food stamp program." Defendant's Points and Authorities at 4.

Defendant emphasizes the line drawn by the Supreme Court between an individual constitutional right to have an abortion and a claim that the government has a constitutional duty to finance abortions:

> There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonent with legislative policy. Constitutional concerns are greatest when the State attempts to impose its will by force of law; the State's power to encourage actions deemed to be in the public interest is necessarily far broader.

Maher v. Roe, 432 U.S. 464, 475-76 (1977) (footnote omitted); *see also Harris v. MacRae*, 448 U.S. 297 (1980). Defendant also cites a Fifth Circuit decision holding that a Medicare patient's constitutional right to communicate by telephone from a hospital does not require the government to reimburse for the cost of the call:

> Since the government is not required to finance the exercise of First Amendment rights, the government may exclude from medicare coverage costs which may in fact be used for such purposes.

Presbyterian Hospital of Dallas v. Harris, 638 F.2d 1381, 1385 (5th Cir.), *cert. denied*, 102 S. Ct. 476 (1981).

A Notice to Counsel filed April 24, 1985, requested the parties to identify the alternatives available to a plaintiff on strike to make the striker and the striker's family eligible for food stamps. Defendant responded:

> As the Court is aware, § 2015(d) of the Food Stamp Act disqualifies from the food stamp program any household containing a member of the household who is on strike. The only "alternatives available," therefore, are to stop being "on strike." Thus, someone on strike can either return to work or quit his job. Both of these actions demonstrate that the individual is no longer on strike. In the former circumstance, the household will be eligible immediately for food stamp benefits. In the latter, the household will be eligible subject to the conditions imposed upon "voluntary quitters". *See* 7 C.F.R. § 273.7(n).

Defendant's Response to Question #1 of the April 24, 1985 Notice to Counsel [Defendant's Response to Question #1] (filed May 5, 1985).

In response to plaintiffs' contention that both of these alternatives impinge upon a striker's right to associate with his union, defendant argues that the two alternatives listed earlier do not necessarily require a striker to sever his union ties: "Plaintiffs have entirely ignored the rather obvious fact that workers feeling the economic pinch of a prolonged strike can pressure their union to reach a settlement. When settlement is reached, all union members return to work together." Defendant's Response to Question Nos. 3 and 4 at 3. Quoting the constitutions of the union plaintiffs in this case, defendant argues that the individual plaintiffs have at least two ways in which they can quit their jobs without leaving the union: "First, the striker can transfer to a job at a different plant within the jurisdiction of the same local if that plant is not being struck; second, the striker can transfer to a different local whose members are not on strike." *Id.* at 3. Defendant concedes, however, that:

> [i]t may also be true that situations arise where suffering workers fail to convince their co-workers that the union should return to work, and the unions refuse to grant relief to these workers in the form of authorizing a transfer. In these situations, workers might choose to leave or be ousted from the union by quitting their union jobs or by crossing picket lines.

Id. at 3-4 (footnote omitted).

B.

Plaintiffs agree that the rational basis test is the one to apply to their equal protection and due process claims. Plaintiffs contend, however, that "merely identifying the test does not end the inquiry." Plaintiffs' Response Brief in Opposition to Motion to Dismiss and Reply Brief in Support of Motion for a Preliminary Injunction [Plaintiffs' Opposition] at 3 (filed Feb. 11, 1985). According to plaintiffs, the rational basis test is "not toothless," *Mathews v. Lucas*, 427 U.S. 495, 510 (1976). The test, argue plaintiffs, is:

> A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'

Plaintiffs' Opposition at 4, *quoting Reed v. Reed*, 404 U.S. 71, 76 (1971), *quoting Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

In support of their argument that the striker disqualification provision is irrational, plaintiffs chiefly rely on a pair of 1973 Supreme Court cases: *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973) and *United States Department of Agriculture v. Murry*, 413 U.S. 508 (1973). In *Moreno*, the Supreme Court held the exclusion of households of "unrelated" persons to be unconstitutional under the rational basis test. The Court explained that "unrelatedness" has nothing to do with the purpose of the Food Stamp Act, which is to meet food needs; that the goal of discriminating against "hippies" was not a legitimate government objective; and that the measure was not a rational means of preventing fraud since it added nothing to the many other anti-fraud protections already in the statute.

In *Murry*, the Supreme Court struck down a food stamp amendment which disqualified households from food stamps if a household member had been claimed as a tax dependent by someone other than a household member the year before. The Court found the amendment not to be a rational measure of household need for food and

found it impermissible as an "irrebuttable presumption" that the household was ineligible for food stamps.[9]

Plaintiffs then apply these cases to the situation at issue. They argue that the striker provision is not a rational means of achieving either the "willingness to work" or the "neutrality" goals cited by the government. Plaintiffs point out that, prior to the striker provision, strikers seeking food stamps still had to meet all the other requirements of the Act, including registering for work, actively looking for other work, and taking any other job that was offered. 7 C.F.R. § 273.7. Thus, just as the Court in *Moreno* ruled that the "fraud-prevention" goal was not rationally furthered because the amendment challenged there added nothing to the other anti-fraud provisions already in the statute, plaintiffs here argue that the "willingness to work" goal is not rationally furthered because the striker provision adds nothing to the statute's many other "willingness to work" provisions already in effect. The provision, they contend, only pressures strikers to return to their place of employment. Yet, non-strikers can refuse to work at a plant where a strike is taking place without any food stamp penalty at all. 7 U.S.C. § 2015(d)(3). If "willingness to work" is the goal, argue plaintiffs, it is not rational to distinguish between the willingness of these two groups to

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[9] According to the *Murry* court:

> [The section of the Food Stamp Act at issue] makes the entire household of which a "tax dependent" was a member ineligible for food stamps for two years: (1) during the tax year for which the dependency was claimed and (2) during the next 12 months. During these two periods of time [the section at issue] creates a conclusive presumption that the "tax dependent's" household is not needy and has access to nutritional adequacy.
>
> . . .
>
> [As such] the Act creates "an irrebutable presumption contrary to fact."

413 U.S. at 511-12.

work at a struck plant. Plaintiffs also argue that the provision creates an irrational "irrebutable presumption" that strikers are voluntarily unemployed regardless of the actual situations.[10]

As to the second claimed goal of the amendment, plaintiffs contend that the provision is not a rational means of ensuring government neutrality between strikers and employers because its sole conceivable effect is to disadvantage strikers. Plaintiffs first quote a 1981 floor statement by Senator Levin, 127 Cong. Rec. S6136-37 (daily ed. June 11, 1981), and a 1977 Committee Report from a previous Congress that had rejected a striker disqualification provision. H. Rep. No. 464, 95th Cong., 1st Sess. 122-27 (June 24, 1977). Both of these contain statements alleging that the striker provision is one-sided with respect to neutrality (e.g., businesses continue to receive full tax benefits for losses incurred during a strike, government contracts can continue to be let to such businesses). Next, plaintiffs argue that it is irrational to think that the striker provision is neutral where the strike is in response to employer conduct that has been found by an administrative law judge pursuant to a complaint issued by the National Labor Relations Board to be an unfair labor practice, such as is the case with at least one of the named plaintiffs in this case. *See* Declaration of Mary Berry at ¶ 7. In such instances, according to plaintiffs, the provision plainly has a non-neutral effect favoring the employer – it pressures strikers to surrender a legal right in order to enable their families to eat or at least obtain food stamps, without putting reciprocal pressure on the employer.

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[10] For example, Johnie Blake, a plaintiff in this case, remained disqualified for food stamps even though the union had made an unconditional offer to return to work, because despite the unconditional offer the employer refused to reinstate the employees. *See* Affidavit of Samuel F. Casazza at ¶ 5 (filed Feb. 11, 1985).

Plaintiffs also distinguish *Ohio Bureau of Employment Services v. Hodory, supra*, in which the Supreme Court held that denial of unemployment benefits to strikers is not unconstitutional. According to plaintiffs, unemployment benefits differ from food stamps in that the former are funded by employer contributions. Consequently, strikers could put additional pressure on an employer by filing for unemployment benefits during a strike. Moreover, unemployment benefits are paid to the claimant alone, rather than allotted by household. Neither of these facts are true of food stamps. Thus, the justification for finding neutrality in *Hodory* is not present here. Rather than ensuring neutrality, plaintiffs argue, the food stamps provision punitively burdens the striker.

Also in support of their argument that the striker disqualification provision is irrational, plaintiffs proffer proof of the difference in treatment between strikers and other voluntary quitters. For example, voluntary quitters can avoid disqualification by showing "good cause" for their quit, e.g., employer discrimination or participation in unfair labor practices. 7 C.F.R. § 273.7(n)(3)(i), (ii). The striker disqualification is absolute: no matter what may be the misconduct of the employer, the employees who strike are disqualified. 7 C.F.R. § 273.1(g).[11]

Finally, plaintiffs argue that indefinite disqualification of a striker's entire household is irrational. They quote *Plyler v. Doe*, a case involving Texas' refusal to educate the children of illegal aliens, to say:

> Even if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct

[11] Other specific differences in treatment between strikers and voluntary quitters are set out in Appendix A.

> against his children does not comport with fundamental conceptions of justice.
>
> . . .
>
> [The challenged statute] is directed against children, and imposes its discriminatory burden on the basis of a legal characteristic over which children can have little control. It is thus difficult to conceive of a rational justification for penalizing these children for their presence within the United States.

457 U.S. 202, 220 (1982). By the same reasoning, plaintiffs argue that application of the striker provision to children and others who happen to be present in the striker's household is irrational and a violation of equal protection.

As its third cause of action, plaintiffs' complaint alleges:

> The anti-striker provision of the Act denies the plaintiffs UAW and UMW[A] and the members of the plaintiffs UAW and Mine Workers their rights of association as ensured by the First Amendment to the United States Constitution to form and join unions for the purpose of engaging in collective bargaining, including the conducting of strikes.

First Amended Complaint at 10. In a later filing, plaintiffs argue further:

> This Court, in applying the rational basis test of the equal protection clause, should take the direct First Amendment implications of the anti-striker amendment into account in weighing the rationality and legitimacy of the provision.

Plaintiffs' Supplemental Post-Hearing Brief at 13-14 (filed March 7, 1985). Finally, in response to the Notice to Counsel issued by this Court on April 24, 1985, plaintiffs argue:

> By conditioning eligibility for Food Stamps on the willingness of an individual to break ranks with fellow union members, the anti-striker provision

> punishes individuals and their families for the exercise of the statutorily protected right to strike.
>
> More importantly for the purposes of this lawsuit, the anti-striker provision inevitably effects [sic] the associational rights of unions and their members by depriving strikers of food assistance to which they are otherwise entitled solely by virtue of their concerted activity.

Plaintiffs' Memorandum of Law Responding to the Court's Notice of April 24, 1985 [Plaintiffs' Memorandum Responding to the Court's Notice] at 8 (filed June 14, 1985).

Quoting the test for a First Amendment infringement of associational rights cited in *Hobson v. Wilson*, 737 F.2d 1 (D.C. Cir. 1984), *cert. denied,* 105 S. Ct. 1843 (1985), plaintiffs argue that "the anti-striker provision serves no legitimate government purpose," *id.* at 9 and that "[e]ven assuming *arguendo* that the exclusion of strikers is a legitimate governmental purpose, the broad exclusion of strikers and their households can hardlly [sic] be defended as one which could not be more narrowly accommodated." *Id.* at 10.

The Notice to Counsel filed April 24, 1985, also asked the parties to identify the alternatives available to a striker who wishes to regain food stamp eligibility. In response, plaintiffs proffer proof that both of the alternatives listed by defendant—that the striker return to work or quit his job—effectively require a plaintiff to sever either his union, or his family ties, or both, in order to restore his eligibility and that of his family for food stamps.

As to the alternative that the striker return to work despite the strike, the constitutions of the UAW and the UMWA provide that a member who crosses an authorized picket line is subject to trials and union discipline. Following a hearing, members who cross a picket line can be deprived of membership in the union as well as receive

other sanctions. Declaration of Gary Bryner at ¶¶ 5-6 (filed June 3, 1985); Declaration of Marty D. Hudson at ¶ 4 (filed June 3, 1985).

Plaintiffs also proffer proof that the second alternative listed by defendant (quitting his job) means that a worker must sever his association with his union. The striker who quits his job must withdraw from union membership. *See* Declaration of Marty D. Hudson at ¶ 5; UAW Const., art. 17, §§ 2-3. Under the UMWA Constitution, a person who quits and works in a non-union mine can be subjected to discipline. Declaration of Marty D. Hudson at ¶ 6. Under both constitutions at issue in this case, a member who no longer works under the jurisdiction of the union eventually loses his union membership. UAW Const., art. 5, art. 6, §§ 1-2, art. 17, § 3; UMWA Const., art. 11, § 1. Upon reemployment in a plant under his former union's jurisdiction, the former union member will have to pay a reinstatement or initiation fee. UMWA Const., art. 11, § 4, art. 13, § 1; UAW Const., art. 16, §§ 1, 9, art. 17, § 3.

Plaintiffs also respond to defendant's contention that the alternatives available to a striker to regain food stamp eligibility do not necessarily cause a worker to leave his union because the worker can simply transfer to a different work location:

> The defendant has misconstrued or misunderstands the meaning of the UAW and Mine Worker constitutional provisions permitting transfers. Defendant's Response at 3. While union membership transfers are permitted, an employee/member must *first* obtain work in a plant or mine under union contract. This is solely up to the employer in an industrial union such as the UAW or Mine Workers, and is practically unlikely in the depressed automobile and coal in-

> dustries. Thus, there is, in reality, no option for strikers to simply transfer to "work" with another union.

Plaintiffs' Reply Concerning the Court's April 24, 1985 Notice to Counsel at 3 (filed July 10, 1985) (emphasis in original).

Finally, plaintiffs point out that a striker could make his family eligible for food stamps by abandoning it and establishing a separate household. *See* 7 C.F.R. § 273.1(g)(1) (striker disqualification applies only to household which contains a striker). As a corollary, the regulation makes clear that some family members could make themselves eligible for food stamps by leaving the striker's household and setting up their own. *Id.* According to plaintiffs, "This alternative poses serious constitutional questions." Plaintiffs' Memorandum Responding to the Court's Notice at 2 n.1, *citing Moreno*, 413 U.S. at 538 (Douglas, J., concurring).

III.

For purposes of the motion to dismiss, it is sufficient to address plaintiffs' first amendment claim in light of the proffered evidence and reasonable inferences therefrom about the effect of the anti-striker provisions upon the associational rights of striking plaintiffs who are otherwise eligible for food stamps. This evidence and these inferences indicate that the statute may threaten the core constitutional right of persons in the position of plaintiffs here to associate with others to let their views be heard, *NAACP v. Alabama, ex rel. Patterson*, 357 U.S. 449 (1958), the corollary right of the union to have their association, *Allee v. Medrano*, 416 U.S. 802 (1974), and the right of families to associate and live together, *Zablocki v. Redhail*, 434 U.S. 374 (1978).

Defendant contends that "since there is no first amendment right to strike, there are no '[first amendment] implications' [of the Food Stamp Act] to take account of." Defendant's Response to Plaintiffs' Supplemental Post-Hearing Brief at 4 (filed March 19, 1985).[12] But what defendant fails to perceive is that it is not simply a union's right to strike which may be threatened by the striker disqualification provision of the Food Stamps Act. Quite apart from any claimed right to strike, the right to join a union, and of a union to promote its lawful interests, is constitutionally protected:

> The first amendment protects the right of all persons to associate together in groups to further their lawful interests. . . . Such 'protected First Amendment

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[12] As noted by defendant, certain restraints on the union's and on members' constitutional rights are permissible. According to the Supreme Court, a union's right to strike "is more vulnerable to regulation than the right to organize and select representatives for lawful purposes of collective bargaining which this Court has characterized as a 'fundamental right'." *International Union, UAWA v. Wisconsin Employment Relations Board*, 336 U.S. 245, 249 (1949). Striking, however, is generally lawful, the permitted regulation being largely to punish violations of valid state and federal laws. According to the Court in *Wisconsin Board*:

> "[The] recognition of the 'right to strike' [in the National Labor Relations Act] plainly contemplates a lawful strike, – the exercise of the unquestioned right to quit work," and it did not operate to legalize the sit-down strike, which state law made illegal and state authorities punished. *Labor Board v. Fansteel Corp.*, 306 U.S. 240. Nor, for example, did it make legal a strike that ran afoul of federal law, *Southern S.S. Co. v. Labor Board*, 316 U.S. 31; nor one in violation of a contract made pursuant thereto, *Labor Board v. Sands Mng. Co.*, 306 U.S. 332; nor one creating a national emergency, *United States v. United Mine Workers*, 330 U.S. 258.

336 U.S. at 259-60.

> rights flow to unions as well as to their members and organizers.'

Professional Association of College Educators v. El Paso County Community College, 730 F.2d 258, 262 (5th Cir.), *cert. denied*, 105 S. Ct. 248 (1984) (footnote omitted), *quoting Allee v. Medrano*, 416 U.S. 802, 819 n.13 (1974).

Defendant bluntly states the alternatives available to a striker who seeks to regain food stamp eligibility:-"return to work or quit his job." Defendant's Response to Questions Nos. 3 and 4 at 3-4. But, plaintiffs are likely to be able to prove that both of the alternatives to striking identified by defendant effectively require a worker to sever his union ties. The evidence proffered thus far indicates that members of the UAW or the UMWA who cross an authorized picket line are subject to trials and union discipline under the unions' respective constitutions. Following a hearing, members who cross a picket line can be deprived of membership in the union as well as receive other sanctions. Declaration of Gary Bryner at ¶¶ 5-6; Declaration of Marty D. Hudson at ¶ 4. Union members who quit employment with the employer with which the union is associated must also forfeit union membership. UAW Const., art. 5, art. 6, §§ 1-2, art. 17, § 3; UMWA Const., art. 11, § 1.

The worker forced to give up his union membership loses numerous incidents of the associational right. The Supreme Court recently noted:

> By resigning, the worker surrenders his right to vote for union officials, to express himself at union meetings, and even participate in determining the amount or use of dues he may be forced to pay under a union security clause.

Pattern Makers', slip op. at 12 n.18, *citing* Wellington, *Union Fines and Workers' Rights*, 85 Yale L.J. 1022, 1046 (1976); *see also* Declaration of Marty D. Hudson at ¶ 8;

UMWA Const., art. 12, § 1; UAW Const., art. 6, § 20.[13] More generally, the individual pressured not to associate loses "a fundamental component of [his] personal liberty." *Republican Party of the State of Connecticut v. Tashjian*, No. 85-7011, slip op. at 5556-57 (2d Cir. Aug. 8, 1985). For, as the Supreme Court recently reiterated:

> [O]ne of the foundations of our society is the right of individuals to combine with other persons in pursuit of a common goal by lawful means.

NAACP v. Claiborne Hardware Co., 458 U.S. 882, 933 (1982).

As an alternative to surrendering the right of union membership, defendant further contends that "workers feeling the pinch of a prolonged strike can pressure their union to reach a settlement." Defendant's Response to

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[13] Although the government may in certain circumstances regulate a union's right to strike, its power over an individual worker's right to associate or not to associate with a union is much more limited. Workers may be required to belong to a union as a condition of employment. But "membership" is limited to paying union dues – a member may not be required to fund political expression by the union if the member objects. *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). Recently the Supreme Court has further circumscribed the permissible interference with individual associational rights which is justified by national labor policy. In *Pattern Makers' League of North America, AFL-CIO, et al. v. National Labor Relations Board, et al.*, No. 83-1894, slip op. (June 27, 1985), the Supreme Court extolled the policy of "voluntary unionism" in holding that a union member must be allowed to resign from the organization without penalty even during a strike. (Such a resignation, however, terminates the member's association with his former union and its members. For the applicable provisions to the unions in this case, see UAW Const., art. 5, art. 6, §§ 1-2, art. 17, § 3; UMWA Const., art. 11, § 1.) Thus, the situation in this case appears to present the "flip" side of the "voluntary unionism" concept enunciated in *Pattern Makers'*. Here it is not the union that seeks to force a member to remain associated. It is the government which seeks to force a member to disassociate.

Questions Nos. 3 and 4 at 3. But this proposal by the government as a means of establishing eligibility would, in effect, coerce a plaintiff to urge his associates to call off a strike even though this urging be contrary to the merits of the controversy, and the striker's personal opinion about it. According to the Supreme Court in *Abood v. Detroit Board of Education*:

> [A]t the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the state.

431 U.S. at 234-35 (citations omitted). In *Abood*, a State statute sanctioned an "agency shop" provision between a union and an employer which required all employees to contribute an amount of money equal to union dues as a condition of employment. In that case the union used a part of the funds to advance beliefs and opinions with which the plaintiffs did not agree. The Court found a First Amendment violation in this State-compelled expression:

> [A] government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment.

431 U.S. at 234 (citations omitted). Neither should the government require an individual to relinquish constitutional rights in order to obtain food stamps. A statute which pressures an individual to adopt, and in fact advocate to his associates, a position *vis a vis* a strike would appear to transgress this fundamental principle articulated in *Abood*: that an individual's belief "should be shaped by his mind and his conscience rather than coerced by the State." *Id.* at 236.

As another alternative to sacrificing union membership, plaintiffs point out that because the striker disqualification only applies to households containing a striker, 7

C.F.R. § 273.1(g)(1), a striker can restore his family's food stamp eligibility by leaving his family and setting up a separate household. But, the right to cohabitate with one's family and with relatives beyond one's immediate family is constitutionally-protected. According to the Supreme Court:

> This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.

Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 499 (1977), *quoting Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639-40 (1974). The Court went on:

> A host of cases . . . have consistently acknowledged a "private realm of family life which the state cannot enter."

id., quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944). Moreover, "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978), *quoting Loving v. Virginia*, 388 U.S. 1, 12 (1967).

The food stamp disqualification provision may thus confront a striker with a complex associational dilemma. Plaintiffs may well establish that in order to make his family eligible for food stamps, a striker may, as a practical matter, be required either to give up his constitutional right to belong to a union, or his constitutional right to marry, have a family, and cohabitate with his relatives. Any state action having such effect of curtailing the right to associate should be subject to the closest scrutiny. Scrutiny is not limited, as defendant contends,[14] to government actions which directly regulate protected ac-

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[14] *See* Defendant's Response to Question Nos. 3 and 4 at 4-5.

tivity. As our Court of Appeals has recently summarized the law in a related context of governmental infringement upon associational rights:

> A line of Supreme Court cases had expressly established . . . that lawful associations and their members have the right to be protected from facially legitimate Government actions that would deter membership or otherwise thwart their efforts to associate and petition the Government for redress of their grievances. . . . [This] principle was not absolute, but made unconstitutional Government action taken for legitimate purposes if it significantly interfered with protected rights of association, unless the Government could demonstrate a substantial . . . or compelling . . . interest to justify the infringement, and that the interest could not more narrowly be accommodated.

Hobson v. Wilson, 737 F.2d at 28 (citations omitted).

The Supreme Court has noted, "It is axiomatic that a complaint should not be dismissed unless 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' " *McLain v. Real Estate Board of New Orleans, Inc. v. United States* 444 U.S. 232, 246 (1980), *quoting Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Here, the facts as alleged and proffered indicate that plaintiff may well be able to establish that the amendment at issue significantly interferes with a worker's protected right of association, and that the government has not demonstrated that a substantial or compelling interest justifies the alleged infringement. Consequently, the pleadings here plainly frame unresolved constitutional issues which make dismissal of this action inappropriate. An accompanying Order will deny the motion to dismiss.

IV.

Plaintiffs' motion for preliminary injunction remains to be considered. It is apparent from the foregoing that once plaintiffs establish the facts proffered about the effects of the anti-striker statute, they may well prevail on the merits of their claim that the anti-striker amendment violates rights guaranteed to plaintiffs by the First Amendment to associate with their families, their unions and fellow union members. It is also likely, however, that if the case were before the Court on the merits, it could very possibly be resolved by a declaratory judgment without resort to any injunction. Plaintiffs have not, however, filed any dispositive motion. It would be more appropriate to address the issue presented in a plenary proceeding on the merits rather than in an interlocutory mode. Accordingly, the accompanying Order will deny, without prejudice,[14] plaintiffs' motion for a preliminary injunction and will set a status call for scheduling disposition of the case on the merits.

Date: Sept. 30, 1985

/s/ LOUIS F. OBERDORFER
United States District Judge

[14] For example, pending a final judgment individual plaintiffs seeking interlocutory relief may wish to supplement their proof in light of this Memorandum to identify specific violations or threats of violation to that plaintiff's first amendment rights.

APPENDIX A

Plaintiffs point out, and defendant does not dispute, the differences in treatment accorded strikers under the striker disqualification provision and that accorded other voluntary quitters. Plaintiffs' Supplemental Post-Hearing Brief (filed March 7, 1985). First, the striker provision is indefinite – the striker and his entire household remain disqualified as long as the striker remains on strike. 7 C.F.R. § 273.1(g) (1985). All of the plaintiffs in this action have already been disqualified for more than one year. One plaintiff, Mary Berry, has been disqualified for five years. Declaration of Mary Berry at ¶ 5. In contrast, the household of an individual voluntary quitter is disqualified for only 90 days[1], after which food stamp eligibility is restored if the quitter seeks other work and the household remains otherwise eligible. 7 C.F.R. § 273.7(n)(1)(v). Moreover, the original 90 day disqualification does not apply if the individual quitter can show "good cause" for leaving work, and the individual is entitled to a hearing to determine if good cause exists. Good cause includes discrimination by an employer or unreasonable work demands or conditions. 7 C.F.R. § 273.7(n)(3)(i), (ii). There is, however, no such "good cause" provision for a striker. Thus, a striker remains disqualified from food stamps even if the strike were precipitated by discrimination, unreasonable working conditions or any other unfair labor practice. It is undisputed that the employer of plaintiff Berry has been found by an administrative law judge pursuant to a complaint issued by the National Labor Relations Board to be committing unfair labor practices, *see* Declaration of Mary Berry at

[1] The 90 day provision replaced a 60 day provision on January 2, 1985, and is the one currently in effect. The voluntary quit regulations that were in effect prior to January 2, 1985, are contained in 7 C.F.R. § 273.7(n) (1984).

¶ 7; yet, Berry remains disqualified because her union refuses to permit its members to work under those conditions.

The striker provision indefinitely disqualifies *all* individuals in the household of a striker. The disqualification includes, for example, an adult child of a striker and the adult child's child, if both reside with the striker. *See* Declaration of Johnie B. Blake at ¶ 4. A voluntary quitter must be the primary wage earner to disqualify his entire household from food stamps.[2] Even if the quitter is the primary wage earner, as mentioned above, the disqualification only lasts for 90 days. 7 C.F.R. § 273.7(n)(i)(v). No other disqualification provision of the Food Stamp Act indefinitely and automatically extends to the entire household of the disqualified individual. Ineligible student's income or resources are not considered in determining the eligibility or coupon allotment of the remainder of the student's household. 7 C.F.R. § 273.5(3). When a member of a household is found to have committed fraud on the program, his income and resources count in determining household eligibility but not when determining the coupon allotment of the household. 7 C.F.R. § 273.11(c)(1).[3]

Strikers are also disqualified indefinitely from food stamp eligibility despite any demonstration of their willingness to accept other work. That is, even if a striker

[2] "Primary wage earner" is defined as a household member over the age of 18 who was acquiring the greatest amount of earned financial support for the household at the time of the quit. 7 C.F.R. § 273.7(n)(1)(iv).

[3] Defendant professes not to understand the relevance of the treatment of students and those who commit food stamp fraud to the issue in this case – the treatment of strikers. Defendant's Points and Authorities at 15 n.7. The relevant comparison here is the extent of household disqualification accorded various categories of individuals due to voluntary acts which result in disqualification.

actively searches for, or accepts, another job, if he remains on strike, he remains disqualified. *See* Plaintiff's Opposition at 13 & n.8. Again, the treatment of strikers and other voluntary quitters is different. Voluntary quitters must comply with work registration and job search requirements, 7 C.F.R. § 273.7(a), (e), (f), but once they do, they may receive food stamps despite continued unemployment (immediately, or after 90 days if their quit was without good cause).

Applicant households are also treated differently if they contain a striker as opposed to an individual voluntary quitter. The voluntary quitter provision only applies if the primary wage earner is unemployed at the time of application, and has voluntarily quit his most recent job without good cause within 60 days of application. 7 C.F.R. § 273.7(n)(1)(i). Thus, if the voluntary quitter is unemployed or has been employed elsewhere since the voluntary quit, he remains eligible for food stamps. But this is not true of strikers who, even if employed elsewhere, remain ineligible for food stamps because of the blanket disqualification of strikers.

Strikers and voluntary quitters are also treated differently with regard to intervening circumstances which would exempt them from the work registration requirement of the Food Stamp Act. A voluntary quitter who, for example, becomes mentally unfit for employment after quitting, but before application for food stamps, remains eligible. 7 C.F.R. § 273.7(n)(2). A striker in the same situation, however, becomes disqualified. 7 C.F.R. § 273.1(g)(1).

To regain food stamp eligibility, a striker must "either return to work or quit his job." Defendant's Response to Question #1. The striker provision thus pressures a striker to work at a struck plant. The second proviso to the amendment, however, makes clear that a household of any individual other than a striker will not be disqualified

"if any of its members refuses to accept employment at a plant or site because of a strike or lockout." 7 U.S.C. § 2015(d)(3).

Finally, the striker provision applies without regard to the voluntariness of the strike. Not every union member votes for a strike, but all members are nevertheless bound by the majority vote. Strikes may often be caused or prolonged by an employer. *See* H. Rep. No. 464, 95th Cong., 1st Sess. 129-130 (June 24, 1977). Even if the employer refuses the employee's unconditional offer to return to work, the disqualification continues. *See* Affidavit of Samuel F. Casazza at ¶ 5.[4] Involuntary quitters, in contrast, can show "good cause" for their quit to demonstrate that their unemployment is not voluntary, 7 C.F.R. § 273.7(n)(3), and must merely show a willingness to accept other work to remain eligible for food stamps. 7 C.F.R. § 273.7(a), (e), (f).

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[4] The parties dispute whether when a striker is permanently replaced by his employer the disqualification continues. Defendant argues that a striker who has been permanently replaced is eligible for food stamp benefits because "presumably such an individual has no job to return to." Defendant's Points and Authorities at 16; *see also* Food Stamp Program Policy Memo (Nov. 15, 1983) [Defendant's Exhibit A]. But the facts as alleged in this case indicate that as a practical matter, the rule is sometimes otherwise. Supplemental Declaration of Johnie B. Blake at ¶ 10; Declaration of Ray Westfall at ¶ 2. This policy is not reflected in certain state food stamp agency manuals. *See* Exhibits 2-4 to Plaintiff's Supplementary Post-Hearing Brief. Neither was the policy reflected in the notices of disqualification received by two plaintiffs in this action, Berry and Blake. *See* Exhibit 5 to Plaintiffs' Supplemental Post-Hearing Brief.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 84-3303

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, ET AL., PLAINTIFFS,

v.

RICHARD A. LYNG, SECRETARY, U.S. DEPARTMENT OF AGRICULTURE, DEFENDANT.

[Filed DEC 22 1986]

ORDER GRANTING INTERIM RELIEF

Upon motion of the plaintiffs' pursuant to Rule 59(e) and the defendant's response thereto, and for reasons stated in the accompanying Memorandum Re Relief Pending Appeal, it is this 22nd day of December, 1986, hereby

ORDERED: that, for the purpose of effectuating relief pending appeal, a class (narrower than that certified in a Memorandum and Order Certifying Class, filed this date) is certified and defined as follows:

> All UAW and UMWA-represented strikers and their households who are otherwise eligible for Food Stamps but for the application of the striker disqualification of the Food Stamp Act (7 U.S.C. § 2015(d)(3)) and its implementing regulations and who file applications for Food Stamps as provided in this Order.

And it is further

ORDERED: that the defendant Secretary of Agriculture is enjoined, pending further orders of this Court or

the Supreme Court, from enforcing the provisions of 7 U.S.C. § 2015(d)(3) and its implementing regulations to disqualify class members from participation in the Food Stamp program when they are determined by a state or local Food Stamp agency to meet the other eligibility requirements of the Food Stamp Act, 7 U.S.C. § 2011 *et seq.*, and its implementing regulations; and it is further

ORDERED: that the retroactive payment of Food Stamps to class members prior to the date on which applications are first taken pursuant to this Order is stayed pending the outcome of the defendant's appeal and further orders of this Court; and it is further

ORDERED: that the defendant Secretary will notify the appropriate state Food Stamp agencies as soon as practicable that they and their subordinate local agencies are required to accept and process the applications of the members of the plaintiff class and promptly to determine their eligibility for Food Stamps beginning with the date of their application (but in no event, prior to January 2, 1987) and for each subsequent month for which their respective applications for Food Stamps are filed; and it is further

ORDERED: that the defendant Secretary will reimburse state and local Food Stamp agencies for the administrative costs associated with these payments as provided by 7 U.S.C. § 2025. Such reimbursements shall be handled in the same fashion as they are normally handled under the Food Stamp Act and its implementing regulations; and it is further

ORDERED: that the defendant Secretary will, at the earliest practicable date, publish appropriate notice in the Federal Register for, among others, the relevant federal, state, and local Food Stamp agencies, including in that notice a copy of this Order; and it is further

ORDERED: that the plaintiff unions shall, within seven (7) business days of the date of this Order, furnish surety or corporate bonds totalling $400,000, which bond the Court finds to be a sufficient amount at this time to protect the defendant's costs of Food Stamps (other than administrative costs) incurred pursuant to this Order and subject to future adjustments in an amount as agreed to by the parties or ordered by this Court. Such bond shall be due and payable to the defendant in the event that this Court's Order of November 14, 1986 is reversed on appeal, and defendant's sole recourse for satisfaction of any additional costs of Food Stamps paid under this Order shall be against the plaintiff unions without recourse to recoupment for collection action directed to individual class members; and it is further

ORDERED: that the parties will work to resolve all questions of compliance with this Order in good faith and will not resort to formal enforcement proceedings in this Court without first providing twenty-one (21) days written notice of the specific compliance problem to the opposing party; and it is further

ORDERED: that the defendant Secretary will give twenty-one (21) days written notice to the plaintiffs of any intent to adjust the amount of bond, before moving this Court for any such adjustment.

December 22, 1986
4:00 pm

/s/ LOUIS F. OBERDORFER
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 84-3303

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, ET AL., PLAINTIFFS,

v.

RICHARD A. LYNG, SECRETARY, U.S. DEPARTMENT OF AGRICULTURE, DEFENDANT.

[Filed DEC 22 1986]

MEMORANDUM RE RELIEF PENDING APPEAL

An order entered November 14, 1986, declared that defendant may not lawfully withhold food stamps from any individual plaintiff's household solely because the household includes a striker for the reason that 7 U.S.C. § 2015(d)(3), the striker amendment to the Food Stamp Act of 1977, 7 U.S.C. §§ 2011-2029, as administered, violates rights guaranteed to plaintiffs by the First and Fifth Amendments to the Constitution. The order withheld injunctive relief until the judgment becomes final. On November 26, 1986, plaintiffs moved to alter or amend the November 14, 1986 order and sought an injunction preventing defendant from enforcing the food stamp striker disqualification. Defendant opposes the motion and in the alternative moves for a stay of any injunction pending appeal to the Supreme Court. On December 14,

1986, defendant noted such an appeal. Meanwhile, there are indications that the Supreme Court will not be able to hear this case until October 1987, or later.

The parties have further briefed and argued the issue of relief. Plaintiffs have filed a careful, albeit necessarily tentative, estimate of the number of plaintiffs' households likely to be eligible for food stamps during the pendency of the appeal. They estimate that the total cost of food stamps which would be issued pending appeal will range between $25,350 and $38,025 per month. Supplemental Memorandum in Support of Plaintiffs' Proposed Order on Interim Relief at 6 (filed December 16, 1986) (copy attached as Appendix A).

The defendant correctly points out the gravity of a judicial declaration that an Act of Congress violates the Constitution. However, he cites no authority for deferral of enforcement of such a declaration until its validity is finally determined by the Supreme Court. Although the November 14 declaration necessarily distinguished between the two relevant decisions of the Supreme Court, neither of which resolves the precise issue posed here, *compare Lyng v. Castillo*, 106 S. Ct. 2727 (1986) *with United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973), the parties have not demonstrated any reason to retract or to modify the declaration. At the trial level, plaintiffs are more than likely to prevail on the merits; they have prevailed. Without purporting to predict the Supreme Court's decision on the merits, the Court is persuaded that, in all of the circumstances here, correct discharge of its constitutional responsibilities requires prospective application of the law as it has been declared, with relief limited to the prevailing class of plaintiffs. *See, e.g., Graves v. Barnes*, 405 U.S. 1201, 1203 (1972) (Powell, J., as Circuit Justice); *Virginia Petroleum Jobbers Ass'n v. Federal Power Commission*, 259 F.2d 921, 925 (D.C. Cir. 1958). It is noteworthy that the same

district court order that declared the statute at issue in *Moreno* to be unconstitutional enjoined defendants from denying food stamp eligibility to the plaintiffs and apparently required no bond pending appeal. *Moreno v. United States Department of Agriculture*, 345 F. Supp. 310, 316 (D.D.C. 1972) (three judge court), *aff'd*, 413 U.S. 528 (1973). The risk of reversal in this case can be recognized by requiring a bond which would enable plaintiffs to reimburse defendant for food stamp payments made pending appeal.

The hardship inherent in the denial of food stamps to any household or person lawfully entitled to them is manifest and well documented in the original record and the supplemental record developed since November 14 with respect to injunctive relief. *See Haskins v. Stanton*, 794 F.2d 1273, 1276-77 (7th Cir. 1986); *Coalition for Basic Human Needs v. King*, 654 F.2d 838, 840-41 (1st Cir. 1981). But for the striker disqualification, the individual plaintiffs who would benefit from interim relief are eligible for food stamps and are by definition living at or near the poverty level, unable to provide an adequate diet for themselves and their families. *See* Plaintiffs' Repty Brief in Support of Motion to Alter or Amend and Attachments 2 through 9. Continued enforcement of the striker disqualification would penalize and inhibit plaintiffs' exercise of their rights to associate and to express themselves (*see* Memorandum filed November 14, 1986 at 5, 7, 11-16), and inflict the consequential, quantifiable harm of denying them "food on the table." *Compare Memphis Community School District v. Stachura*, 106 S. Ct. 2537 (1986). Such proof of irreparable harm overcomes defendant's application for a stay, in the absence of strong proof of an inequitable burden upon defendant.

The administrative burden on defendant of providing payments for food stamps for approximately 600 strikers pending appeal is not materially greater than what is re-

quired of him in administering the food stamp program for the benefit of the millions of households already participating.[1] The plaintiffs have assumed responsibility for appropriate notice to potentially eligible households. The potential administrative burden is further contained by the decisions to limit relief to the plaintiff class and not to permit intervention pending appeal. Memorandum and Order Certifying Class (filed December 22, 1986). There is a clear public interest in enforcement of First and Fifth Amendment rights put in jeopardy by the striker disqualification. The risk of loss should defendant prevail on appeal will be minimized by the bond requirement, presently $400,000, and provision for adjustment of it should it prove to be inadequate. To assure minimal administrative complications, the Court invited the parties to settle on an order in a way that would to the fullest extent possible anticipate and avoid administrative complications.[2] The accompanying order is that proposed by defendant (without waiving his opposition to the decision on the merits or to relief at this time) except for the bond requirement.

Defendant proposed a $300,000 bond, with provision for automatic increases should the food stamp payments for strikers reach 90 percent of the bond. Plaintiffs proposed that the union plaintiffs post a $400,000 bond with provision for *ad hoc* adjustments on motion of either party. The plaintiffs' proposal also contemplates that the

[1] The Court considered an interim order which would provide food stamps for the households of eligible strikers, but would reduce each allotment to exclude the striker. *See* Memorandum of November 14, 1986 at 15-17. The defendant indicated that such a requirement might complicate interim administration. The principle will be reconsidered in the settling of a final order at such time as the November 14 declaration may become final.

[2] Counsel have alluded to several agreements between the parties which are not incorporated in the order, but designed to facilitate administration of it, e.g. the provision for monthly reports of actual and anticipated disbursements.

union plaintiffs will hold the individual plaintiffs harmless from any reimbursement obligation, should the Supreme Court reverse. The plaintiffs' proposals on these aspects have merit.

At a hearing on the proposed orders, counsel for the parties advised that there would be monthly reports of the actual payment experience. These should provide ample warning of any departure from the estimate which might require modification of the bond, or a cessation of payments if plaintiffs cannot commit to maintaining adequate security. Accordingly, the accompanying order will require defendant to commence payments for food stamps for eligible plaintiffs and class members who apply as soon after January 2, 1987, as is practicable. The order adopts the plaintiffs' proposal for a $400,000 bond pending appeal, but affords a hearing before any bond adjustment is required and encourages voluntary adjustment. There is no provision for retroactive relief pending appeal.

Date: December 22, 1986

/s/ LOUIS F. OBERDORFER
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 84-3303

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, ET AL., PLAINTIFFS,

v.

RICHARD A. LYNG, SECRETARY, U.S. DEPARTMENT OF AGRICULTURE, DEFENDANT.

[Filed DEC 22 1986]

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PLAINTIFFS' PROPOSED ORDER ON INTERIM RELIEF

Plaintiffs have proposed that the bond in this matter initially be set at $400,000, with the possibility of subsequent adjustment, upon either agreement between the parties or defendant's application to the Court. The bond is intended to protect the defendant's costs of food stamps under this Order. As clarified at the hearing on December 18, 1986, the "costs of food stamps" means the value of the food stamps issued pursuant to this Order and does not include any additional administrative costs. Under 7 U.S.C. § 2025, the Food Stamp Act provision providing for administrative costs, any extra administrative costs—if any—under this Order would not be distinguishable from other administrative costs. Since plaintiffs—not defendant—will provide notice to class members of this Order, and since it is estimated that relatively few households per month (i.e., perhaps 500 nationwide) might be eligible for

food stamps under this Order, any administrative costs associated with this appeal—even if they could be segregated—are clearly *de minimus.*[1]

The basis for plaintiffs' belief that $400,000 bond is sufficient at this time is the following:

(A) Estimate of number of UAW and UMWA-represented individuals on strike (not including individuals who are locked out or permanently replaced and therefore not presently affected by the striker disqualification, 7 U.S.C. § 2015(d)(3)):

7570 people.[2]

[1] This conclusion is further buttressed by the fact that USDA's regulations require that food stamp agencies accept and process applications from applicants notwithstanding their apparent ineligibility. See 7 CFR 273.2(C)(1) and (C)(2)(i). Thus, even if this injunction were not to issue, the food stamp agencies are already legally obliged to process applications from strikers. Assuming, *arguendo*, that these regulations are being followed, the requested injunction should not generate any additional administrative burdens for taking and processing applications.

[2] This figure is derived by taking the average number of strikers receiving strike fund benefits in each union over a recent period and subtracting out the number of those individuals who are locked out or permanently replaced:

UAW:	7960 – 1000 (est.)	= 6960
UMWA:	1420 – 810	= 610
		7570

Source: December 1986 Affidavit of Percy Baxter, ¶ 3, Att. 11a to Pltfs' Reply Brief in Support of Motion to Alter or Amend (hereafter Plaintiffs' Reply); December 15, 1986 Statement of Ralph Edward Bowling, Att. 11b to Pltfs' Reply Brief. See also December 19, 1986 Affidavit of Percy Baxter, attached hereto. As Mr. Baxter's Affidavit indicates, the estimate of 1000 (12.5% of 7960) as the proportion of UAW strikers locked out or permanently replaced is *very conservative*. Currently 62.6% of the 11429 John Deere strikers are locked out, while 25.8% of the 2457 non-Deere strikers are locked out. If we

(B) Estimate of number of strikers who might be eligible for food stamps.

6.7% of 7570 = 507 [3]

(C) Estimate of monthly food stamp allotment to strikers' households who are eligible for food stamps.

$50-$75

Under current food stamp policy, a household is not eligible for food stamps at all if its allowable resources (both liquid and non-liquid) exceed $2,000.[4] 7 CFR 273.8; 51 Fed. Reg. 11009, April 1, 1986. In addition, a house-

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applied the lower 25.8% lockout figure to the 7960 average, the 6960 figure used in the estimate would be too high by more than 1000 people (i.e., 7960 minus 25.8% = 5906).

[3] The 6.7% figure is derived from the March 26, 1981 GAO Report CED 81-85, "Information on Strikers' Participation in the Food Stamp Program." Att. 1 to Plaintiffs' Reply. Based on surveys by the Department of Agricuture's Food and Nutrition Service (FNS), which administers the Food Stamp Program, GAO reported the following percent of strikers participating in the food stamp program:

Sept. 1976	3.6%
February 1978	36.4%
November 1978	8.8%
April 1979	3.6%
November 1979	10.8%

As explained throughout the GAO Report (pp. 3, 4, 5, 6), because of the existence of a coal miner's strike in the February 1978 survey figures, the GAO did not include the February 1978 figures in any of its projections.

For that reason, and perhaps more importantly, because subsequent to February 1978 the UMWA instituted a selective strike fund providing $200 weekly benefits to striking miners (see Answers of UMWA to Defendant's First Set of Interrogatories, ¶17-18), we excluded the February 1978 figures and calculated the average percentage of strikers participating in the food stamp program in the FNS' four remaining survey months. Thus, 3.6 + 8.8 + 3.6 + 10.8 ÷ 4 = 6.7%.

[4] Except in households including one or more members over 60, the resources may not exceed $3,000.

hold whose income exceeds certain specified income levels (either 100% or 130% of poverty level) will not be eligible for food stamps. 7 CFR 273.9; 51 Fed. Reg. 19880 (June 3, 1986). Furthermore, assuming a household meets these asset and income eligibility standards, 30% of non-exempt household income (after specified deductions) is subtracted from the maximum food stamp allotment, thereby reducing the amount of the household's food stamp allotment. 7 CFR 273.9; 7 C.F.R., 273.10; 51 Fed. Reg. 36043 (Oct. 8, 1986).

The current *maximum* allotments of food stamps are:

Household Size	1	2	3	4	5	6	7	8	Each Addt'l. Person
Maximum Monthly Allotment	$81	$149	$214	$271	$322	$387	$428	$489	$61

51 Fed. Reg. 36043 (Oct. 8, 1986).

Applying these basic principles to the case at bar, assuming a UAW or UMWA striker household's assets became low enough to make the household eligible and assuming the household had no non-exempt income except strike fund benefits: hypothetical 1, 2, or 3-person mineworker households receiving $200 weekly strike benefits would not be eligible for any food stamps, while a four-person mineworker household would be eligible for $58/month of stamps, a five-person household would be eligible for $109/month of stamps.[5] A hypothetical one-

---

[5] Under 7 CFR 273.10(c)(2)(i), weekly non-exempt income is multiplied by 4.3 to determine monthly non-exempt income. Statutory deductions are then subtracted from monthly non-exempt income, 7 CFR 273.9; 51 Fed. Reg. 36043 (Oct. 8, 1986). 30% of the remainder is substracted from the maximum monthly food stamp allotment for the household size to determine the household's food stamp allotment. Applying these rules to a hypothetical mineworker household – assuming the household was entitled to a $50 excess shelter

person UAW striker household receiving $100/week of strike benefits would not be eligible for food stamps, while a two-person household would be eligible for $65/month; a three-person household for $130/month; a four-person household for $187/month; and a five person household for $238/month.[6]

To the extent that the household had *any* non-exempt income other than strike benefits (see 7 CFR 273.9(b)), the

---

deduction, (7 CFR 273.9(d)(5); 51 Fed. Reg. 36043 (Oct. 8, 1983), gives the following results:

Non-exempt income:	$200 weekly
× 4.3	= $860 monthly
Subtract standard deduction	− 99
	761
Subtract excess shelter deduction	− 50
	711 × 30% = 213.30 [Amount to be subtracted from maximum monthly allotment]

[6] Applying the rules described above,

Non-exempt income	= $100/week
× 4.3	= 430/month
Subtract standard deduction	= −99
	331
Subtract excess shelter deduction	= −50
	281 × 30% = $84.30 [Amount to be subtracted from maximum monthly allotment]

household would receive even fewer food stamps than described above.[7]

Based on the assumption of 507 average striker households eligible for food stamps, as computed above (p. 3), the total cost of food stamps under the proposed Order might range between $25,350 per month (or $304,200 per year)[8] assuming a $50 monthly food stamp allotment and $38,025 per month (or $456,400 per year)[9] assuming a $75 monthly allotment. The proposed $400,000 bond is closer to the top of that range, and would be enough, even if the $75 monthly allotment is used, to last nearly one year.

Obviously, the calculation of the food stamp cost under the Order is speculative. Plaintiffs believe, however, that the estimates are reasonable and, if anything, overestimate likely costs. While the average number of UAW and UMWA non-locked out and non-permanently replaced strikers will vary and cannot be predicted with precision, the timing of the major UAW and UMWA contracts is such that no major strikes should occur in either union before this case would be decided on appeal. The UAW-Chrysler contract does not expire until September 1988 and the national bituminous-coal-UMWA contract runs through January 1988. December 15, 1986 Statement of Ralph Edward Bolling, ¶ 7, Att. 11b to Plaintiffs' Reply. The General Motors and Ford UAW contracts do not expire until September 14, 1987. Even if a UAW strike should occur after September 14, 1987, given the low asset and income levels prerequisite to food stamp eligibility, it

---

[7] Furthermore, if the households were not entitled to an excess shelter deduction as the examples assume, the households would also receive fewer food stamps.

[8] 507 × 50 = 25,350 × 12 = 304,200

[9] 507 × 75 = 38,025 × 12 = 456,300

is highly unlikely that a typical GM or Ford worker would be immediately eligible for Food Stamps. Furthermore, as described *supra*, p. 2, n. 2, it is very likely that the figures we have used on the likely number of non-locked out strikers is higher than is likely to occur. Obviously, if the number of striker households eligible for food stamps is lower than our estimates, the costs of food stamps under this Order will be lower than the $25,000-$38,000 monthly estimates predicted.

For the reasons described above, plaintiffs believe that a bond of $400,000 is not only substantial, but is a good faith estimate of the amount necessary to cover the value of food stamps issued under the proposed Order. If experience proves that the amount is insufficient, the proposed Order provides for the possibility of adjustment either by agreement of the parties or by Order of this Court.

Respectfully submitted,

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By: /s/ WENDY L. KAHN
Wendy L. Kahn

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 84-3303

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, ET AL., PLAINTIFFS,

v.

RICHARD A. LYNG, SECRETARY, U.S. DEPARTMENT OF AGRICULTURE, DEFENDANT.

SUPPLEMENTAL AFFIDAVIT OF PERCY BAXTER

STATE OF MICHIGAN)
) ss
COUNTY OF WAYNE)

Percy Baxter, being first duly sworn, states his affidavit as follows:

1. This affidavit supplements his earlier affidavit (Plaintiff's Exhibit 11a, attached to Plaintiffs' Reply Brief (filed December 15, 1986)) concerning the average monthly number of UAW strikers from October 1985 until September 1986.

2. The UAW Strike Insurance Program does not distinguish between individuals who are on strike or involved in a lockout in making strike benefit payments. The figures provided in my earlier affidavit are an accurate reflection of the number of individuals receiving strike benefits who were involved in either strikes or lockouts. However, in addition to these total figures, the Department's records do indicate locals involved in a lockout. A review of the Department's records for the period of October 1985 until September 1986 discloses that five lockouts involving 1557 members ocurred during this period.

3. Our records do not indicate which strikes are those in which the employer has hired permanent replacements for strikers.

4. A review of the Department's "Current Strikes" report dated December 15, 1980, reveals the following information:

Total UAW Recipients of Strike Benefits	13,886
Less Total John Deere Recipients Locked Out (of 11,429 Total Deere Recipients)	7,150
Less Other Recipients Locked Out	633
Total UAW Strikers as of December 15, 1986	6,103

Further affiant sayeth not.

/s/ PERCY BAXTER
Percy Baxter

Subscribed and sworn to before me
this 19th day of December, 1986.

/s/ KAREN V. HARMON
Notary Public

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 84-3303

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, ET AL., PLAINTIFFS,

v.

RICHARD A. LYNG, SECRETARY, U.S. DEPARTMENT OF AGRICULTURE, DEFENDANT.

[Filed DEC 22 1986]

MEMORANDUM AND ORDER CERTIFYING CLASS

On January 10, 1985, plaintiffs filed a motion for class certification pursuant to Fed.R.Civ.P. 23. Plaintiffs requested certification of a class consisting "of all UAW and Mine Worker strikers and their households who are or were otherwise eligible for Food Stamps but for the anti-striker provision of the Act, 7 U.S.C. § 2015(d)." Memorandum of Law in Support of Plaintiffs' Motion for Class Certification at 6 (filed January 10, 1985). Defendant consented to class certification but of a somewhat narrower class. The November 14, 1986 memorandum and order declared the striker provision unconstitutional, but did not rule upon plaintiffs' motion.

Plaintiffs have subsequently renewed their motion for class certification. In plaintiffs' present motion, they seek certification of a class consisting of

> All UAW and UMWA strikers and their households (which, for purposes of this certification order only,

> includes strikers and their households in: UFCW Local 400, on strike against Marval Poultry; Steelworkers Local 3701 on strike against St. Josephs Resources; and Teamsters Local 912 on strike against Watsonville Canning) who:
>
> 1) will be, are, or have been otherwise eligible for Food Stamps but for the application of the striker disqualification of the Food Stamp Act (7 U.S.C. § 2015(d)(3)) and its implementing regulations, and
>
> 2) who have previously filed an application for Food Stamps, or were discouraged or prevented from filing an application by their state or local food stamp agency, or who will in the future apply for Food Stamps.

Brief in Support of Plaintiffs' Motion to Alter or Amend, Class Certification, and Intervention at 11 (filed November 26, 1986).

Defendant still consents to class certification but poses three objections to the class as defined by plaintiffs.

First, defendant objects to the inclusion of non-UAW and non-UMWA strikers within the class, as envisioned in the first paragraph of plaintiffs' proposed class definition. Defendant also opposes plaintiffs' concurrent motion to intervene three individual named plaintiffs to represent these strikers and their households.

Plaintiffs' requests for intervention and expansion of the class both come after entry of final judgment in their favor. "[I]ntervention attempts after final judgments are 'ordinarily looked upon with a jaundiced eye.' Interventions after judgment have a strong tendency to prejudice existing parties to the litigation or to interfere substantially with the orderly process of the court." *United States v. U.S. Steel Corp.*, 548 F.2d 1232, 1235 (5th Cir. 1977) (citation omitted). For this reason,

> The general rule is that motions for intervention made *after* entry of final judgment will be granted

> only upon a strong showing of entitlement and of justification for failure to request intervention sooner.

United States v. Associated Milk Producers, Inc., 534 F.2d 113 (8th Cir.), *cert. denied*, 429 U.S. 940 (1976) (emphasis in original). Plaintiffs note that the proposed intervenors were affiants in the summary judgment stage of this litigation. Obviously, therefore, they were aware of the litigation. As no justification has been proferred for their failure to request intervention sooner, plaintiffs' motion for intervention and expansion of the class to include non-UAW and non-UMWA strikers should be, and will be, denied.

Defendant also argues that the class should be limited to persons "who were discouraged from filing an application by their local food stamp agency *because they were on strike*," rather than for reasons unrelated to the striker provision. In response, plaintiffs concede that there should be some relation between a person's status as a striker and the reason he was discouraged from applying for food stamps, but disagree that his status as a striker need be the only or the predominate reason for the discouragement. Instead, plaintiffs propose modifying the class to include persons "who were prevented or discouraged from filing an application . . . due, *in part*, to their status as strikers or members of a striker's household. . . ." The importance of this distinction is uncertain. The proof problems of establishing "discourgement" are already sufficient to preclude precision in the definition of the class. Nevertheless, a striker and his household should not be excluded from the plaintiff class merely because they were discouraged from applying for food stamps because of some factor in addition to the striker provision. Consequently, an accompanying order will certify a class to include persons "who were prevented or discouraged

from filing an application . . . due, in part, to their status as strikers or members of a striker's household. . . ."

Finally, defendant argues that the class should include only those persons whose applications were denied or discouraged by operation of § 2015(d)(3) within one year prior to the filing of this suit. In support, defendant relies upon 7 U.S.C. § 2023(b), which states in pertinent part:

> In any judicial action arising under this chapter, any food stamp allotments found to have been wrongfully withheld shall be restored only for periods of not more than one year prior to the date of the commencement of such action. . . .

By its terms, this section applies only to cases arising under the Food Stamp Act. As this case arises under the Constitution, section 2023(b)'s limitation on recovery does not apply.

For the foregoing reasons, it is this ____ day of December, 1986, hereby

ORDERED: that plaintiffs' motion for intervention should be, and hereby is, DENIED; and it is further

ORDERED: that plaintiffs' motion for class certification should be, and hereby is, GRANTED in part and DENIED in part; and it is further

ORDERED: that the plaintiff class should be, and hereby is, CERTIFIED and DEFINED to include

> All UAW and UMWA strikers and their households who:
>
> 1) will be, are, or have been otherwise eligible for Food Stamps but for the application of the striker disqualification of the Food Stamp Act (7 U.S.C. § 2015(d)(3)) and its implementing regulations, and
>
> 2) who have previously filed an application for Food Stamps, or were discouraged or prevented from filing an application by their state or local food stamp agen-

cy due, in part, to their status as strikers or members of a striker's household, or who will in the future apply for Food Stamps.[*]

December 22, 1986

/s/ LOUIS F. OBERDORFER
United States District Judge

* Note that an Order Granting Interim Relief extends that interim relief to a class which is narrower than the class which would benefit from the order of November 14, 1986, should it be affirmed.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 84-3303

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, ET AL., PLAINTIFFS,

v.

RICHARD A. LYNG, SECRETARY, U.S. DEPARTMENT OF AGRICULTURE, DEFENDANT.

[Filed NOV 14 1986]

ORDER

For reasons stated in a memorandum filed today and another memorandum filed on September 30, 1985 in respect of an order denying defendant's motion to dismiss, it is this 14th day of November, 1986, hereby

ORDERED: that defendant's motion for summary judgment is DENIED; and it is further

ORDERED: that plaintiffs' motion for summary judgment is GRANTED; and it is further

ORDERED, ADJUDGED AND DECLARED: that defendant may not lawfully withhold food stamps from any individual plaintiff's household solely because the household includes a striker for the reason that 7 U.S.C. § 2015(d)(3), the striker amendment to the Food Stamp Act of 1977, 7 U.S.C. §§ 2011-2029, as administered, violates rights guaranteed to plaintiffs by the First and Fifth Amendments to the Constitution. No injunction will

issue at this time in the expectation that when this judgment becomes final the defendant will honor it without compulsion.

/s/ LOUIS F. OBERDORFER
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 84-3303

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, ET AL., PLAINTIFFS,

v.

RICHARD A. LYNG, SECRETARY, U.S. DEPARTMENT OF AGRICULTURE, DEFENDANT.

[Filed DEC 11 1986]

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that the defendant, Richard A. Lyng, hereby appeals to the Supreme Court of the United States from the final Order entered in this action on November 14, 1986.

This appeal is taken pursuant to 28 U.S.C. § 1252 and 28 U.S.C. § 2101.

Done this 11th day of December, 1986.

Respectfully submitted,

Richard K. Willard
Assistant Attorney General

Joseph E. Digenova
United States Attorney

/s/ SHEILA LIEBER
Sheila Lieber

/s/ JAMES A. GARDNER
James A. Gardner

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 84-3303

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, ET AL., PLAINTIFFS,

v.

RICHARD A. LYNG, SECRETARY, U.S. DEPARTMENT OF AGRICULTURE, DEFENDANT.

[Filed DEC 30 1986]

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that the defendant, Richard A. Lyng, hereby appeals to the Supreme Court of the United States from the final Orders entered in this action on November 14, 1986, and December 22, 1986.

This appeal is taken pursuant to 28 U.S.C. § 1252 and 28 U.S.C. § 2101.

Done this 30th day of December, 1986.

Respectfully submitted,

Richard K. Willard
Assistant Attorney General

Joseph E. Digenova
United States Attorney

/s/ SHEILA LIEBER
Sheila Lieber

/s/ JAMES A. GARDNER
James A. Gardner

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MOTION

(2)

No. 86-1471

In The

Supreme Court of the United States

October Term, 1986

RICHARD A. LYNG, Secretary of Agriculture,
Appellant,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, et al.,
Appellees.

Appeal from the United States District Court
for the District of Columbia

MOTION TO AFFIRM

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26 pp

QUESTION PRESENTED

THE QUESTION PRESENTED IS WHETHER THIS COURT SHOULD AFFIRM THE DISTRICT COURT'S JUDGMENT THAT THE DISQUALIFICATION FROM FOOD STAMPS OF OTHERWISE ELIGIBLE STRIKERS AND THEIR HOUSEHOLDS WAS AN UNCONSTITUTIONAL INTERFERENCE WITH THE APPELLEES' FIRST AMENDMENT RIGHTS AS WELL AS A VIOLATION OF THE EQUAL PROTECTION COMPONENT OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.*

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* In addition to the parties listed in the caption, the appellees are the United Mine Workers of America (UMWA), Mary Berry, Johnie B. Blake, Barm Combs, Patricia Ann Combs, Mark Dyer, Geneva Dyer, and a class of otherwise eligible UAW and UMWA strikers and their households.

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TABLE OF AUTHORITIES

No. 86-1471

In The

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October Term, 1986

RICHARD A. LYNG, Secretary of Agriculture,
Appellant,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, et al.,
Appellees.

Appeal from the United States District Court for the District of Columbia

MOTION TO AFFIRM

The appellees move, pursuant to Rule 16.1, to affirm the decision of the district court.

STATEMENT

This appeal concerns the constitutionality of an amendment to the Food Stamp Act which generally prevents households containing a member who is on strike from receiving food stamps. 7 U.S.C. § 2015(d)(3). The district court, after careful consideration of the factual record developed below, declared that the challenged statute as applied interfered with the First Amendment rights of the plaintiffs and did not rationally further a legitimate governmental purpose in violation of the equal protection component of the Due Process Clause

of the Fifth Amendment. (App. 1a-16a).[1] The court subsequently granted injunctive relief to halt enforcement of the striker provision against otherwise eligible striker households represented by the appellee unions. (App. 48a-50a).[2]

The challenged provision:

> . . . disqualifies households from obtaining food stamps if the household contains a member involved in a labor dispute, other than a lockout, unless the household was eligible for food stamps prior to the strike.
>
> (App. 4a).

The district court found that the striker provision had operated to deny food stamps to households for an indeterminate period, even after their permanent replacement by their employers. (App. 4a-6a). In order to avoid this disqualification from food stamps, the court found that:

> . . . strikers have the choice of leaving their households, abandoning a strike by returning to work, quitting their jobs, or attempting to persuade their unions to call off the strike.
>
> (App. 5a).

In addition, the appellees established that strikers have lost or abandoned their union membership, due in part to the financial pressures contributed to by their disqualification from food stamps. (App. 6a-7a). The district court also emphasized the numerous and discriminatory

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[1] "App." refers to the Appendices to the Jurisdictional Statement.

[2] By "otherwise eligible," appellees refer to households containing a member on strike who not only meet the food stamp financial guidelines, but who also meet the food stamp work registration and job search rules. *See, infra*, 15-16, 17 n. 7.

"substantial differences" under the Food Stamp Act between the treatment of strikers and their households and the treatment of individuals and their households who voluntarily leave their employment. (App. 7a-8a).

Grounding its analysis in these facts, the district court next considered the decision of this Court in *Department of Agriculture* v. *Moreno*, 413 U.S. 528 (1973) in light of *Lyng* v. *Castillo*, No. 85-250 (June 27, 1986). The district court concluded that the facts placed this case within the rationale of *Moreno*. (App. 8a-10a). The court then proceeded to its analysis and conclusions, which the court based on the related, but alternative, grounds of the First Amendment and the equal protection component of the Due Process Clause of the Fifth Amendment. The district court based its determination that the striker provision was unconstitutional upon five independent legal conclusions. (App. 11a-15a).

First, the court determined that the striker provision "interfered or threatened to interfere with the First Amendment right of the individual plaintiffs to associate with their families . . . with their union . . . and with fellow union members . . . as well as the reciprocal First Amendment right of each union plaintiff to its members' association with the union." (App. 11a) (Citations omitted). Second, the district court held that the "statute as administered interferes with strikers' rights to express themselves about union matters free of coercion by the government." (App. 11a) (Citation omitted). Analogizing to the situation in which the denial of unemployment insurance benefits was held to impermissibly pressure an individual's free exercise of religion, the court found that:

> The same dynamic is present here and requires a conclusion that denial of food stamps to the individual plaintiffs violates that First Amendment

> right to associate and to express themselves freely in the course of that association.
>
> (App. 12a).

Having already pointed out the factual distinctions between this case and the *Lyng* v. *Castillo* case, the court concluded that the historically hostile government treatment of strikers was an additional factor bolstering its conclusion that this case resembled *Moreno* more than *Lyng* v. *Castillo*. (App. 13a). Fourth, the court held that the Secretary's justifications for the disqualification of strikers and their households from food stamps were seriously weakened by the "significant and discriminatory differences between the treatment accorded a striker who stops work in concert with others and an individual who quits a job." (App. 13a; *See also* App. 44a-47a).

The court's fifth conclusion turned on the treatment of non-striking household members. The striker provision's disqualification of the entire household, it held:

> . . . necessarily means that a striker who is a member of a household and who exercises his constitutionally protected rights to associate with his union and other members and to form and express his opinion about the merits of the strike sacrifices not only his own food stamps but also those of other members of his household, including infant children and the dependent elderly.
>
> (App. 13a).

The court then examined the Secretary's asserted justifications for the household's disqualification and concluded that neither administrative convenience nor government neutrality in labor disputes were justifications for the denial of food stamps to non-striking household members. (App. 13a-15a).

ARGUMENT

The district court, acting within the parameters of this Court's well-established precedent, properly concluded that Congress cannot constitutionally deprive strikers and their households of food stamps simply by virtue of a household member's participation in a strike. Adopting the approach of the district court, the appellees will first discuss the First Amendment and its application to this appeal.

1. This Court's decisions have established an individual's right of association to pursue "a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts* v. *United States Jaycees*, 468 U.S. 609, 622 (1984) (citations omitted). Such rights of association are protected from infringement, absent "regulations adopted to serve compelling state interests . . . that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.*, 623 (citations omitted). *See also NAACP* v. *Clairborne Hardware Co.*, 458 U.S. 886, 910-912 (1982); *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 419 (1971).

The district court also relied upon cases of this Court establishing that "the right to cohabitate with one's family and with relatives beyond one's immediate family is constitutionally protected." (App. 41a). Numerous cases have noted this "Court's historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest . . . ." *Santosky* v. *Kramer*, 455 U.S. 745, 753 (1982) and *Zablocki* v. *Redhail*, 434 U.S. 374, 383-386 (1978) (and cases cited therein). *See, Griswold* v. *Connecticut*, 381 U.S. 479, 85 S.Ct. 1678 (1965) and *Eisenstadt* v. *Baird*, 405 U.S. 438, 92 S.Ct. 1029 (1972). *See also, Moreno*, 413 U.S. at 541 (Douglas, J., concurring).

The appellee unions are ". . . labor organizations which exist for the purpose, *inter alia*, of advancing the economic and political interests of their members." (App. 4a). The individual appellees were members of their unions or of the household of a member who engaged in strikes and were denied food stamps solely due to the striker status of a household member. (App. 5a-7a; *see also*, App. 18a n. 1). Thus, these strikers took collective action in association with other strikers in an attempt to counteract the unfair labor practices of their employers or to exert economic pressure upon them. (App. 5a-7a; 31a).

Since a strike, by definition, is group activity, a statute denying food stamps to strikers and their households necessarily implicates the striker's associational rights. The collectively formed opinion to conduct the strike, as well as the related picketing, leafletting, speeches, and other lawful strike activity is within the ambit of the First Amendment. *Thornhill* v. *Alabama*, 310 U.S. 88, 103 (1940); *Professional Ass'n of College Educators* v. *El Paso County Community College*, 730 F.2d 258, 262 (5th Cir.), *cert. den.*, 469 U.S. 881 (1984). This Court has recognized that the First Amendment protects associational rights from indirect, as well as direct, infringements. *Healy* v. *James*, 408 U.S. 169, 183 (1972); *Bates* v. *City of Little Rock*, 361 U.S. 516, 523 (1960); *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 461-462 (1958). As the district court states, "quite apart from any claimed right to strike, the right to join a union, and of a union to promote its lawful interests, is constitutionally protected . . ." (App. 37a).

The individual plaintiffs' households were deprived of food stamps solely because a member was on strike. (App. 5a-6a). The appellees established below that changes in child custody and marital relations occurred,

in part, due to the added hardship caused by the denial of food stamps to the households of strikers. (App. 18a n. 1; 45a). The district court's decision quite properly found that the striker provision implicated appellees' First Amendment rights.

2. There is no question that the striker provision places a substantial burden upon the appellees' speech and associational rights. The Secretary conceded below that individuals confronted by the food stamp striker provision could avoid the provision by either returning to work or quitting their job with the struck employer. (App. 27a). Furthermore, the Secretary stated that such individuals could "pressure their union to reach a settlement," although, failing that, "workers might choose to leave or be ousted from the union by quitting their union jobs or by crossing picket lines." (App. 28a). The district court found that the denial of food stamps to plaintiff Barm Combs and his household was, in fact, the proximate cause of the abandonment of his association with his fellow strikers and his disassociation from his union. (App. 6a-7a). In other cases, individuals, such as plaintiff Mary Berry, altered their family living arrangements due, in part, to the additional hardship imposed by the denial of food stamps. (App. 18a n. 1). As the district court noted, under the operation of the striker provision, entitlement to food stamps could be maintained ". . . if the striker left his family, or his family left him." (App. 15a).

The district court analogized this case to *Sherbert* v. *Verner*, 374 U.S. 398, 404 (1963), which held that the denial of unemployment insurance benefits to a claimant whose religious beliefs precluded Saturday work was an impermissible burden upon her First Amendment rights of free exercise. (App. 12a). Contrary to the Secretary's

assertion, the district court's analogy to the *Sherbert* case is consistent with that employed by this Court in non-religious First Amendment cases. For example, in *Keyishian* v. *Board of Regents*, 385 U.S. 589, 606 (1967), this Court, citing *Sherbert* v. *Verner*, struck down a state law which conditioned employment as a public school teacher upon an oath of non-membership in "subversive" organizations.[3]

In these and other cases, this Court explored the consequences of a challenged action to determine its effect upon First Amendment rights. *See also Healy* v. *James*, 408 U.S. at 181 and *Speiser* v. *Randall*, 357 U.S. 513, 518-519 (1958). The district court's course was no different when it concluded in light of *Sherbert* that the burdens placed upon appellees' speech and associational rights exceeded the permissible limits of the First Amendment. (App. 12a).

3. The Secretary argues that the striker provision does not prohibit union members from expressing their views, but rather "it simply refuses to fund the decision to strike." Jurisdictional Statement at 13. Citing *Harris* v. *McRae*, 448 U.S. 297 (1980), the Secretary falsely portrays this case as one which seeks to compel federal funding for strikes through the payment of food stamps. Rather, having established a food stamp program, appellees seek to prevent the Secretary from effectively penalizing their exercise of protected rights.

In the instant case, appellees seek food stamps for which they are otherwise financially eligible, but for

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[3] More recently, in *Tashjian* v. *Republican Party of Connecticut*, No. 85-766 (December 10, 1986), this Court held a state statute that granted voting rights in primary elections only to registered party members was an unlawful limit on the political party's associational rights. The Court found that the party's efforts to involve independent voters in its affairs were impermissibly burdened by the challenged statute.

their status as strikers or members of a striker's household. As pointed out earlier, this status necessarily involves a striker's assertion of constitutionally protected associational rights. In contrast, the denial of Medicaid funding for an abortion to the plaintiffs in *McRae* was not triggered by their exercise of any protected rights. That is, Medicaid funds sought to implement the plaintiffs' constitutional right to choose an abortion were denied by the congressional refusal to fund abortions, but this denial of funds was not triggered by any constitutionally protected act on the part of the individual.

In fact, the *McRae* decision recognized this distinction. The Court noted:

> A substantial constitutional question would arise if Congress had attempted to withhold all Medicaid benefits from an otherwise eligible candidate simply because that candidate had exercised her constitutionally protected freedom to terminate her pregnancy by abortion. This would be analogous to *Sherbert* v. *Verner* . . . where this Court held that a State may not . . . withhold *all* unemployment compensation benefits from a claimant who would otherwise be eligible for such benefits but for the fact that she is unwilling to work one day per week on her Sabbath. But the Hyde Amendment [which denied federal funding for most abortions], unlike the statute at issue in *Sherbert*, does not provide for such a broad disqualification from receipt of public benefits. Rather, the Hyde Amendment, like the Connecticut welfare provision at issue in *Maher*, represents simply a refusal to subsidize certain protected conduct. A refusal to fund, without more, cannot be equated with the imposition of a "penalty" on that activity.
>
> 448 U.S. at 317 n. 19 (Emphasis in original) (text and citation omitted).

This distinction is critical for purposes of constitutional analysis. While the government is under no constitutional obligation to operate a food stamp program, it must operate within constitutional constraints once a program is established. This Court's opinion in *Sherbert* further clarifies the distinction made in *McRae*. In characterizing its holding in *Speiser* v. *Randall, supra*, the Court's opinion in *Sherbert* explained:

> In *Speiser* v. *Randall* . . . we emphasized that conditions upon public benefits cannot be sustained if they so operate, whatever their purpose, as to inhibit or deter the exercise of First Amendment freedoms. We there struck down a condition which limited the availability of a tax exemption to those members of the exempted class who affirmed their loyalty to the state government granting the exemption. While the State was surely under no obligation to afford such an exemption, we held that *the imposition of such a condition upon even a gratuitous benefit inevitably deterred or discouraged the exercise of First Amendment rights of expression*. . . .
>
> *Id.*, 405. (Emphasis added) (citation omitted).

The *Sherbert* court, having concluded that the denial of unemployment benefits "effectively penalizes" the claimant's exercise of religion, then went on to conclude that the state had failed to justify the infringement of her First Amendment rights with a compelling state interest, or to demonstrate that no alternative forms of regulation could accomplish its interests without infringing First Amendment rights, *id.*, 406-407. This Court has reaffirmed the vitality of the *Sherbert* analysis in *Thomas* v. *Review Board*, 450 U.S. 707, 101 S.Ct. 1425 (1981) and in *Hobbie* v. *Unemployment Appeals Commission*, No. 85-993 (February 25, 1987).

Having established a program, categories of recipients cannot be based upon unconstitutional considerations. *Plyler* v. *Doe*, 457 U.S. 202 (1982); *Maher* v. *Roe*, 432 U.S. 464 at 469-470 (1977); *Department of Agriculture* v. *Moreno*, 413 U.S. 528, 93 S.Ct. 2821 (1973); *Sherbert* v. *Verner, supra*; *Frost & Frost Trucking Co.* v. *Railroad Commission*, 271 U.S. 583, 593-94 (1926). Thus, while the Constitution admittedly does not command government funding of constitutional rights, it does not countenance governmental denials of benefits which burden or penalize the exercise of protected rights, as shown above.[4]

4. The district court next proceeded to determine whether the striker provision was narrowly tailored to accommodate the governmental interests purportedly served. *See Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960); *Schaumberg* v. *Citizens for a Better Environment*, 444 U.S. 620, 635-39 (1980). The court found that the exclusion of only strikers from food stamps, as opposed to strikers and their households, was administratively feasible. The court below based this determination upon the fact that the food stamp agency had knowledge of a household's

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[4] The defendants cite *Ledesma* v. *Block*, W.D. Mich. No. G82-94, a case which followed the approach they advocate here. Jurisdictional Statement at 10. In *Ledesma*, the district court granted summary judgment to defendants, and ruled that the anti-striker provision did not violate the First Amendment rights of strikers and their households. With due respect to the *Ledesma* court, the reasoning in its oral bench opinion on this point suffers from the same faults illustrated here by the Secretary's arguments. In short, the *Ledesma* court's focus on the "funding" theory caused it to shortchange the striker provision's impact on strikers' associational rights.

United Steelworkers v. *Block*, 578 F.Supp. 1417 (D.S.D. 1982), also cited by the Secretary, *id.*, was not a holding on the constitutionality of Section 2015(d)(3) and the district court's passing reference to the issue in that case has been termed *dicta* in a related case by the Court of Appeals. *United Steelworkers* v. *Johnson*, 799 F.2d 402, 404 (8th Cir. 1986).

composition and was already able to pay a decreased food stamp allotment if the striker left the household. (App. 14a-15a).

The administrative feasibility of disqualifying only strikers and not their households is further demonstrated by the fact that in many other cases the Act penalizes an individual, rather than the entire household, for sanctioned conduct. In the case of sanctions for intentional program violations (fraud), ineligible aliens, failure or refusal to provide a social security number, and failure to comply with workfare requirements, the sanctioned individual is treated as a "nonhousehold member." 7 C.F.R. § 273.11(c) (1986), as amended in 51 *Fed. Reg.* 10788 (December 31, 1986). Benefit levels are then computed without taking the sanctioned individual into account, with the remaining household members receiving the reduced benefits. *Id.* The voluntary quit disqualification, to take a different example, only applies in the case of a "primary wage earner." 7 C.F.R. § 273.7(h) (1986). Thus, the district court's determination that the striker provision's disqualification of the entire household was not "narrowly tailored" is well supported by the Act and the regulations.

In any event, administrative feasibility cannot furnish the basis, in and of itself, for a classification where other reasonable means of accomplishing the end exist. *See, Vlandis* v. *Kline*, 412 U.S. 441, 451 (1973); *Rinaldi* v. *Yeager*, 384 U.S. 305, 309 (1966).

5. As a related basis for its ruling, the district court held that the striker provision violated the equal protection component of the Due Process Clause of the Fifth Amendment. Again, the district court's approach was dictated by this Court's previous decisions. In these cases, this Court has required that:

> The federal sovereign, like the States, must govern impartially. The concept of equal justice under law is served by the Fifth Amendment's guarantee of due process, as well as by the Equal Protection Clause of the Fourteenth Amendment.

Lyng v. *Castillo*, slip op. at 2 n. 2, quoting *Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 100 (1976) (citations omitted).

The rational basis test requires that legislation must be rationally related to a legitimate governmental interest. *Department of Agriculture* v. *Moreno*, 533. In *Moreno*, this Court confronted a federal food stamp amendment which rendered ineligible any household containing an individual unrelated to any other member of the household. The Court in *Moreno* first noted that the amendment was "clearly irrelevant" to the purposes of the food stamp program, i.e., the provision of food assistance to low income households. *See* 7 U.S.C. § 2011. 413 U.S. 533-534. Looking to other possible justifications, the Court noted a reference in the legislative history indicating congressional concern about "hippies" receiving food stamps. The Court rejected this justification, stating that "a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *Id.*, 534 (Emphasis in original). The Court also rejected the prevention of fraud as a rational basis for the amendment, given the existing anti-fraud provisions and the lack of any "practical effect" of the amendment upon the prevention of fraud. *Id.*, 536-537. As a result, the Court in *Moreno* struck down the amendment as devoid of any rational basis.

The court below included in its analysis a comparison of this Court's decisions in *Department of Agriculture* v. *Moreno* and *Lyng* v. *Castillo*. (App. 8a-10a). The court noted that in *Castillo* this Court rejected the use of heightened scrutiny in an equal protection challenge to a

statute which required that related persons living together had to apply for food stamps as a single household. (*Id.*, 9a). The district court further noted this Court's conclusion in *Castillo* that the challenged statute did not interfere with family living arrangements. (*Id.*). Finally, the court below observed that *Castillo* distinguished *Moreno* on the basis that the 1971 household definition disqualified not only unrelated persons living together, but related persons who chose to live with an unrelated person. (App. 9a-10a). *See Lyng* v. *Castillo*, slip op. at 4 n. 3.

The striker provision bears a stronger resemblance to the statute in *Moreno* than that in *Castillo*. In *Castillo*, Congress selected a household definition providing that related individuals living together were required to apply for food stamps as a single household. *Id.*, slip op. at 1 n. 1. As a result, all related individuals had their income and resources considered in relation to their food stamp eligibility, resulting in a reduction in or loss of benefits. *Id.*, slip op. at 1-2. However, in no case was a household with income and resources below food stamp eligibility standards denied benefits as here or in *Moreno*. *Id.*, slip op. at 4 n. 3. In this case and in *Moreno*, Congress conditioned food stamp eligibility upon extraneous factors unrelated to income, resources, or the purposes of the Food Stamp Act. *See also Department of Agriculture* v. *Murry*, 413 U.S. 508 (1973). As a result, the district court properly concluded that *Moreno* was controlling in this case.[5]

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[5] It is difficult to fathom the Secretary's repeated assertions that the district court applied "heightened scrutiny." The district court clearly noted that appellees did not advocate the use of any test other than the rational basis test. (App. 8a, 28a). The court, in adopting a standard of scrutiny, went on to agree that the plaintiffs "correctly suggest" that heightened scrutiny "may not be in order" and cited cases applying the rational basis test. The court, in addition, termed the disqualification of non-striking households as critical to

(*concluded on page 15*)

In addition, the district court noted the presence of historical discrimination against strikers, finding that this factor was similar to the reference in *Moreno* to "hippies." The historical treatment of strikers was an additional factor placing this case within the rationale of *Moreno*, rather than that of *Castillo*. (App. 12a-13a).[6]

6. Continuing its analysis, the district court found that there were substantial factual differences under the Food Stamp Act in the treatment of strikers as compared to the treatment of individuals who voluntarily leave their work "not in concert with others." (App. 7a). Among these distinctions are the ninety-day limit on the duration of the voluntary leaving disqualification, 7 C.F.R. § 273.7(h)(2)(iii), the opportunity of a "quitter" to show good cause for leaving a job, 7 C.F.R. § 273.7(h)(2)(ii), and the fact that the quit disqualification only applies in the case of a "primary breadwinner." (App. 7a-8a). The court termed these distinctions "significant and discriminatory" and found that their presence undercut the Secretary's assertion that the striker provision was justified as an effort to link food stamp eligibility to a willingness to work. (App. 13a).

The presence of alternative provisions of the Food Stamp Act and the regulations pertaining to work regis-

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(*continued from page 14*)

its appraisal of the "rationality" of the statute. (App. 13a). In the final analysis, the district court found that this case was controlled by *Moreno*, rather than *Castillo*. (App. 13a). *Castillo* itself recognized that *Moreno* employed a rational basis standard, and it is hard to argue that in applying *Moreno* the court below did not apply a rational basis test. *Lyng* v. *Castillo*, slip op. at 4.

[6] The Secretary falsely claims that in this portion of the opinion the district court "held" that unions and strikers "warrant special constitutional protection." Jurisdictional Statement at 15. The district court clearly made no such "finding." (App. 12a-13a).

tration, job search, and the right to refuse struck work also undercuts the proffered justifications for the striker provision. In order to be otherwise eligible for food stamps, a striker and all non-exempt members of the household must register for work. 7 C.F.R. § 273.7(a). In addition, "job ready" food stamp recipients must seek work. 7 C.F.R. § 273.7(f). Failure to comply with these requirements without good cause exposes the household to sanctions. Therefore, the striker provision contributed virtually nothing beyond existing requirements in tying food stamp eligibility to a willingness to work.

In addition, the second proviso to Section 2015(d)(3) states that food stamp recipients can refuse employment at "a plant or site because of a strike or lockout." 7 U.S.C. § 2015(d)(3). This proviso applies to all food stamp households except those including a striker. *Id.* Therefore, the only additional "work" to which the striker provision ties food stamp eligibility is the "work" vacant due to the strike. The striker provision's only addition to food stamp eligibility standards is thus the pressure produced upon strikers and their families to return to work or find other work in order to end the financial burden of the strike. Congress recognized this economic reality even as it passed the anti-striker provision in the 1981 Food Stamp amendments. The House Agriculture Committee noted than that:

> In the 1977 Act, this Committee refused to eliminate strikers and the members of their households from consideration for participation simply because they were on strike, since such an automatic exclusion seemed unfair and inequitable and would have involved the government in the non-neutral act of pressuring the worker to abandon the strike.
>
> H.Rep. No. 97-106(1) at 142 (1981).

The court properly concluded that neither government neutrality in labor disputes nor administrative convenience justified the denial of food stamps to "innocent" household members, especially when a more narrow disqualification was possible. (App. 13a-14a).

7. The Secretary attempts to justify the striker provision as an effort by Congress to channel limited federal funds to assist the neediest households. Jurisdictional Statement at 4, 9-10 and 19. This justification was not asserted before the district court. This "savings argument" overlooks the obvious factual point that those denied food stamps by the striker provision must meet the same financial guidelines applicable to all other food stamp households. That is, in addition to being on strike, the striker must show the same need for food purchasing assistance as in every other food stamp application.[7] Thus, the striker provision had little "practical effect" in targetting benefits to the "truly needy."

More importantly, many governmental classifications in the food stamp area save money, but such savings, standing alone, cannot serve as a justification for the rationality of the classification. This Court rejected the Secretary's savings argument in *Shapiro* v. *Thompson*, 394 U.S. 618 (1969), where it stated:

> We recognize that a State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures,

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[7] Prior to the 1981 amendments enacting the striker provision, strikers were able to receive food stamps if they met the other eligibility guidelines of the Act and regulations. Figures gathered during this time illustrated that eligibility for strikers is by no means automatic. Senator Levin cited a Government Accounting Office study during debate on the bill which later became the striker provision. The GAO found that in four of the five periods studied, 89 to 96 percent of all strikers did not participate. The fifth period included the 1978 coal strike, during which 64 percent of strikers did not participate. 127 Cong.Rec. S6136-37 (June 11, 1981) (remarks of Senator Levin).

> whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens. It could not, for example, reduce expenditures for education by barring indigent children from its schools. Similarly, in the cases before us, appellants must do more than show that denying welfare benefits to new residents saves money. The saving of welfare costs cannot justify an otherwise invidious classification.
>
> *Id.*, 633 (footnote omitted).

8. Based upon its analysis, the district court reached its final determination:

> The foregoing requires the conclusion that the striker amendment as administered, when considered in light of its impact on the constitutional rights of the plaintiffs and on innocent members of the families of the individual plaintiffs, is not sufficiently tailored to the objectives stated by its defenders to pass constitutional muster.
>
> (App. 15a).

CONCLUSION

For these reasons, the decision of the district court should be affirmed.

Respectfully submitted,

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April 13, 1987

REPLY BRIEF

No. 86-1471

In the Supreme Court of the United States

OCTOBER TERM, 1986

RICHARD A. LYNG, SECRETARY OF AGRICULTURE,
APPELLANT

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS
OF AMERICA, UAW, ET AL.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

REPLY MEMORANDUM FOR THE APPELLANT

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TABLE OF AUTHORITIES

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REPLY MEMORANDUM FOR THE APPELLANT

Appellees acknowledge that the district court has squarely invalidated a federal statute (Mot. to Aff. 1-2) and they do not deny that the decision below significantly impairs an important governmental program. Appellees simply contend that the district court's decision is correct. But far from "acting within the parameters of this Court's well-established precedent" (Mot. to Aff. 5), the district court's free-wheeling judgment striking down a provision of the Food Stamp Act of 1964 cannot be reconciled with the decisions of this Court and warrants review by this Court.

1. Appellees agree with the district court (Mot. to Aff. 5-12) that 7 U.S.C. 2015(d)(3) violates the First Amendment. Relying on largely anecdotal evidence of hardships

faced by certain families of striking workers, appellees contend (Mot. to Aff. 7) that Section 2015(d)(3) "places a substantial burden upon the appellees' speech and associational rights."

In so contending, however, appellees fail to distinguish the decision in *Lyng* v. *Castillo*, No. 85-250 (June 27, 1986), in which this Court rejected virtually the same "associational rights" claim pressed by appellees and upheld by the district court. The Court's analysis in *Castillo* is equally controlling here: Section 2015(d)(3) simply does not "directly and substantially" interfere with family living arrangements or with the right of unions to associate for common ends. What the statute *does*—and does legitimately—is to impose a rational criterion for the allocation of scarce federal resources. In doing so, Section 2015(d)(3), like any other social welfare legislation, necessarily draws distinctions that "leave some comparatively needy person outside the favored circle" (*Schweiker* v. *Wilson*, 450 U.S. 221, 238 (1981)). But this Court has cautioned that "the validity of a broad legislative classification is not properly judged by focusing solely on the portion of the disfavored class that is affected the most harshly by its terms." *Schweiker* v. *Hogan*, 457 U.S. 569, 589 (1982).

At bottom, Section 2015(d)(3), like the Medicaid statute upheld in *Harris* v. *McRae*, 448 U.S. 297, 315 (1980), "places no governmental obstacle in the path of" strikers and their families, but rather "represents simply a refusal to subsidize certain protected conduct" (448 U.S. at 317 n.19). Appellees strain to deny this basic distinction, asserting (Mot. to Aff. 8-10) that in *McRae* the government withheld funds "to implement" the right to choose an abortion, whereas here the denial of benefits is "triggered by the[] exercise of * * * protected rights" (Mot. to Aff. 9). This is no more than a semantic quibble. If, like a striker, the plaintiff in *McRae* had fully exercised her right before

applying for federal funds, she would still have been denied benefits under the applicable statute; in that event, the denial of benefits would have been "triggered" by plaintiff's exercise of a right. But there is nothing in this Court's decision in *McRae* to suggest that, had the facts been thus altered, the Medicaid statute would have failed to pass constitutional muster.*

2. Conceding that Section 2015(d)(3) need only be rationally related to a legitimate governmental interest to survive equal protection scrutiny (Mot. to Aff. 13, 14-15 n. 5), appellees nevertheless assert (*id.* at 12-18) that the statute cannot be sustained. Appellees liken Section 2015(d)(3) to the statutory attempt to deny food stamps to "hippie communes," rejected by this Court in *Department of Agriculture* v. *Moreno*, 413 U.S. 528 (1973). Here, as there, appellees maintain (Mot. to Aff. 14), "Congress conditioned food stamp eligibility upon extraneous factors unrelated to income, resources, or the purposes of the Food Stamp Act."

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*Moreover, appellees fundamentally misconstrue the language that they quote at length from *McRae* (Mot. to Aff. 9). In the cited portion of the *McRae* case (448 U.S. at 317 n.19), this Court distinguished the "refusal to subsidize certain protected conduct" from "a broad disqualification from receipt of public benefits." The Court concluded that while the latter, broader disqualification "would be analogous to *Sherbert* v. *Verner*, 374 U.S. 398 [(1963)]," the mere "refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity." By enacting Section 2015(d)(3), Congress did not "broadly disqualify" striking workers or their families from the Food Stamp program; Congress simply refused to extend benefits for any loss of income that resulted from a strike. What is more, even that limited disqualification lapses as soon as the strike is at an end. Thus, appellees' claim that Section 2015(d)(3) unconstitutionally "penalizes" the assertion of a right to strike cannot be squared with the language from *McRae* on which appellees rely.

This claim founders, first, on the fact—acknowledged by the district court (J.S. App. 10a)—that Section 2015(d)(3) is rationally related to the "legitimate legislative objective[] [of] requiring a person able to work to do so in order to receive food stamps." That policy, as we explained in the jurisdictional statement, is basic to the Food Stamp Act as a whole. The district court, having determined that Section 2015(d)(3) rationally promoted this legitimate goal, should not have ventured farther, in pursuit of a more "narrowly tailored" statute.

Indeed, appellees do not dispute that it was entirely rational to tie the receipt of food stamps to a willingness to accept available employment. Instead, they assail the effectiveness of Congress's efforts. Noting that even striking workers must register for and seek other work (Mot. to Aff. 15-16), appellees assert that Section 2015(d)(3) "contribute[s] virtually nothing beyond existing requirements in tying food stamp eligibility to a willingness to work" (Mot. to Aff. 16). But this misses the mark. However vigorously a striking worker seeks other jobs, one job—his old job—remains available to him. In that essential respect, the striking worker has an option that is not open to the voluntary quitter, or so Congress could rationally have concluded.

Finally, appellees contend that Section 2015(d)(3) cannot be defended as a rational effort to maintain the appearance of neutrality in labor disputes (Mot. to Aff. 17) or to conserve scarce resources (*id.* at 17-18), "especially when a more narrow disqualification [i]s possible" (*id.* at 17). Appellees do not explain, however, how Congress could have achieved its goal of labor neutrality while at the same time offering food stamps, which Congress viewed as tantamount to providing strike benefits that should instead be paid by the unions themselves. And while appellees make (*ibid.*) the "obvious factual point that those denied food

stamps by [Section 2015(d)(3)] must meet the same financial guidelines applicable to all other food stamp households," they do not dispute that Congress is entitled to seek budgetary savings, except where such savings are pursued by means of " 'invidious distinctions between classes of its citizens' " (Mot. to Aff. 18, quoting *Shapiro* v. *Thompson*, 394 U.S. 618, 633 (1969)). Appellees do not suggest, however, that Section 2015(d)(3) creates any such "invidious distinctions."

For these reasons and those stated in the jurisdictional statement, probable jurisdiction should be noted. The Court may also wish to consider summary reversal.

Respectfully submitted.

CHARLES FRIED
Solicitor General

APRIL 1987

JOINT

APPENDIX

No. 86-1471

In the Supreme Court of the United States

OCTOBER TERM, 1986

RICHARD A. LYNG, SECRETARY OF AGRICULTURE,
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JOINT APPENDIX

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JURISDICTIONAL STATEMENT FILED
MARCH 12, 1987
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CASE NO. CIV. 84-3303

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November 7, 1984	First Amended Complaint Filed
September 30, 1985	Order Denying Appellant's Motion To Dismiss And Denying Appellees' Motion For A Preliminary Injunction
November 14, 1986	Order Denying Appellant's Motion For Summary Judgment And Granting Appellees' Motion For Summary Judgment
December 15, 1986	Notice Of Appeal Filed
December 22, 1986	Order Granting Appellees Injunctive Relief, Certifying A Class, And Directing Certain Appellees To Furnish A Bond Pending Appeal
December 30, 1986	Amended Notice Of Appeal Filed

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 84-3303

INTERNATIONAL UNION, UAW, ET AL., PLAINTIFFS,

v.

JOHN R. BLOCK, SECRETARY,
U.S. DEPARTMENT OF AGRICULTURE, DEFENDANT.

DEFENDANT'S RESPONSE TO QUESTION #1 OF THE APRIL 24, 1985 NOTICE TO COUNSEL

This is in response to the Court's first question contained in the April 24, 1985 Notice to Counsel, i.e. "What alternatives are available to a plaintiff now on strike to make the striker and the striker's household eligible for food stamps?"

As the Court is aware, § 2015(d) of the Food Stamp Act disqualifies from the food stamp program any household containing a member of the household who is on strike. The only "alternatives available," therefore, are to stop being "on strike". Thus, someone on strike can either return to work or quit his job. Both of these actions demonstrate that the individual is no longer on strike. In the former circumstance, the household will be eligible immediately for food stamp benefits. In the latter, the household will be eligible subject to the conditions imposed upon "voluntary quitters". See 7 C.F.R. § 273.7(n).

Respectfully submitted,

RICHARD K. WILLARD
Acting Assistant Attorney
General

JOSEPH E. diGENOVA
United States Attorney

/s/ LEWIS K. WISE
LEWIS K. WISE

/s/ THOMAS MILLET
THOMAS MILLET

OF COUNSEL:

ROGER WIENER
Office of General Counsel
Department of Agriculture

Attorneys, Civil Division
Department of Justice
9th & Pennsylvania Ave., N.W.
Washington, D.C. 20530
Telephone: (202) 633-3786

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 84-3303

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW

AND

UNITED MINE WORKERS OF AMERICA, PLAINTIFFS,

v.

JOHN R. BLOCK, SECRETARY, UNITED STATES DEPARTMENT OF AGRICULTURE, DEFENDANT.

Hon. Louis F. Oberdorfer

DECLARATION OF ALPHONSO ALEXANDER

1. My name is Alphonso Alexander.

2. I work for Caterpillar Tractor Company in Peoria, Illinois. Our union, UAW Local 974, was on strike against Caterpillar from October, 1982 to April, 1983.

3. Both my ex-wife and I were on strike. At that time, we had five children in our home aged 20, 18, 17, 16 and 5 months.

4. At the time of the strike, we received Food Stamps only once. Afterwards, we were denied Food Stamps. We were told that we were ineligible because we were strikers.

5. The denial of Food Stamps, and other financial problems, caused a hardship on our family and a strain in the relationship between my wife and me. It contributed to our separation and divorce.

I hereby affirm, under penalty of perjury, that the foregoing is true and accurate to the best of my knowledge and belief.

11-23-85	/s/ ALPHONSO ALEXANDER
Date	Signature

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, ET AL., PLAINTIFFS,

v.

JOHN R. BLOCK, SECRETARY, UNITED STATES DEPARTMENT OF AGRICULTURE, DEFENDANT.

DECLARATION OF MARY BERRY

Mary Berry, a plaintiff herein, states as follows:

1. She lives at 36700 Goodard, Romulus, Michigan 48174. She rents a room at that location for $35 a week.

2. Her only income at this time is $85 per week in UAW Strike Insurance benefits. Her medical insurance coverage is also paid by the UAW.

3. Her approximate monthly expenses include the following expenditures: $80 for gas and oil for her car, $25 for laundry, $6.50 for drug co-payments, $17.50 for a monthly doctor's visit, and $110 for food, car insurance, and personal items.

4. She owns a 1975 Mercury Cougar, a black and white television set, and a crock pot. She does not own any other disposable non-exempt personal property. She owns no savings or checking accounts, stocks, bonds, or luxury items.

5. She has been on an authorized strike against her employer, Plymouth Stamping Co. since September 9, 1980. The strike began at that time after the labor agreement between the UAW and her employer expired. The

employer sought concessions from the local membership and refused to bargain in good faith with the union.

6. She is a member of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW and Local 985, UAW.

7. A complaint has been issued charging the employer with unfair labor practices by the National Labor Relations Board and an administrative law judge has upheld the complaint and determined that Plymouth Stamping has engaged in unfair labor practices by refusing to bargain in good faith with the UAW, her authorized bargaining agent.

8. Following the beginning of the strike she gradually spent her savings and sold off her personal property to pay expenses for herself and her teenage son. By approximately March or April 1981 she applied for and received Food Stamps for one month for herself and her son. In April 1981 she moved out of her apartment because she was no longer able to pay the rent. She moved to a rental room and voluntarily gave up custody of her son to her ex-husband because she was no longer able to afford the expenses of supporting him. Her son continues to live with his father at this time.

9. She applied for Food Stamps on August , 1984, and her application was denied that same day because of her status as a striker.

10. She is financially unable to secure the necessities of life for herself and the receipt of Food Stamps would assist her by increasing her food purchasing power.

Pursuant to 28 U.S.C. § 1746, I certify under penalty of perjury that the foregoing is true and correct.

/s/ MARY BERRY
Mary Berry

Executed on:
October 28, 1984

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 84-3303

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW,

AND

UNITED MINE WORKERS OF AMERICA, PLAINTIFFS,

v.

JOHN R. BLOCK, SECRETARY, UNITED STATES DEPARTMENT OF AGRICULTURE, DEFENDANT.

Hon. Louis F. Oberdorfer

DECLARATION OF DONALD A. BIVENS

1. My name is Donald A. Bivens.

2. I work for Caterpillar Tractor Company in Aurora, Illinois. Our union, UAW Local 145, was on strike against Caterpillar from October, 1982 to April, 1983.

3. At the time of the strike, my wife and I had three children aged six, two and one. The two youngest were allergic to milk and needed a special soybean formula which was very expensive.

4. We used every dime of our savings and even borrowed money from my parents in order to get by. My wife went to work part time.

5. At first, we received Food Stamps but were subsequently told that we were ineligible because I was a striker.

6. My two younger children were sick a great deal during the period of the strike and I believe it was, in part, due to a lack of nourishment. The policy of denying Food Stamps especially hurt my children.

7. During that time, we knew people who were better off financially than we were who were getting Food Stamps because they were not on strike.

8. Because of our rather desperate situation during this difficult time, I tried to find work elsewhere which would have required that I abandon the strike despite my support of the strike and the importance to me of my job at Caterpillar and my membership in the Union. I was unable to find another job in spite of my efforts.

9. When I returned to work, my wife was able to quit the part time job in order to stay home with our small children.

10. I do not think we got a good contract because many of us needed to go back to work in order to feed our children and therefore were willing to accept almost any settlement from the Company to get back to work.

11. After our Food Stamps were cut off because I was a striker, we requested a hearing. After the strike ended and I returned to work, we were awarded the back Food Stamps due to a procedural error by the Department of Public Aid. We did not get the Food Stamps until after I returned to work, however.

I hereby affirm, under penalty of perjury, that the foregoing is true and accurate to the best of my knowlege and belief.

[illegible]	/s/ DONALD A. BIVENS
Date	Signature

DECLARATION OF JOHNIE B. BLAKE

I, Johnie B. Blake, a plaintiff, do hereby declare and state:

1. I am a member of the UAW and its Local 449 and have been engaged in an authorized strike at my employer's plant in Rockford, Illinois, since April 16, 1983. The strike was caused by the Employer's relocation of a substantial part of its operations out of state.

2. The National Labor Relations Board issued a complaint against the Employer charging unlawful relocation of operations and bad faith bargaining. An administrative law judge found that the Employer committed unfair labor practices by relocating certain of its operations without bargaining in good faith with the Union.

3. I live at 220 Oakley Avenue, Rockford, Illinois. Living with me are my son Charles, age 16; my daughter, Charisse; Charisse's daughter, Rowena, age 2; and my three grandsons, Cabarik, age 10, Akee, age 4, and Lamar, age 5. My three grandsons have been living with me since the first week of May, 1984. They were taken away from my daughter, Renee Blake, by the Department of Children and Family Services and I became their guardian.

4. Charisse received food stamps for Rowena and herself from the time Rowena was born until the approximately early part of September, 1984. At that time she was cut off because, according to Public Aid, I was the head of the household and I am on strike.

5. I applied for food stamps for my three grandsons when they came to live with me. In about July, 1984, I was denied food stamps for them because I am on strike. Our household nonexempt assets are less that $1,500.

6. The denial of food stamps for Charisse, her daughter, and for my three grandsons has caused serious hardship for my family. Our total monthly income for seven people is $250.00 per month which Charisse receives

from Public Aid, $225 per month which I receive from Public Aid for my three grandsons, and $85.00 per week in strike benefits. I will be receiving some money from the Department of Children and Family Services for taking care of my grandsons starting in October, but I do not know how much at this time. At that time, the $225.00 per month from Public Aid, which is only temporary, will cease. Our gas has been turned off for nonpayment of the bill. I owe the gas company about $733.00. We have gas heat and it is beginning to get cold in Rockford. I will have to have heat for the children this winter. I am also behind on my water bill ($105.00) and my sanitary bill ($32.00). If I am not able to pay these bills, my water may be turned off, also.

7. My electric bill is about $65.00 per month and my mortgage payment is $175.00 per month. The car insurance for my 1975 Dodge is $144.00 per year and my telephone bill is about $26.00 per month. I have no savings or checking accounts. I am simply unable to keep up with all of these bills. If I cannot keep up with the mortgage, I will lose my house. We would not be able to find rental housing for seven people at $175.00 per month or less. As for food, we do the best we can. In addition to what we can afford to spend on food, we go to food pantries and other agencies which provide food vouchers or free food. It is nearly impossible to get adequate food for seven people in this way.

8. I have been hospitalized five times since June 1983 and have had major surgery twice in that period of time. While the Union has paid for my insurance, the insurance did not cover all of the bills and I have numerous unpaid medical bills. I am being hounded by collectors but am simply unable to pay these bills on my income.

9. The cutoff of Charisse's food stamps and my inability to get food stamps for my grandsons make it even

more difficult to keep up with the bills. Receipt of food stamps would assist us by increasing our food purchasing power.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October ____, 1984.

/s/

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF COLUMBIA

CIVIL ACTION NO. 84-3303

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW,

AND

UNITED MINE WORKERS OF AMERICA, PLAINTIFFS,

v.

JOHN R. BLOCK, SECRETARY, UNITED STATES DEPARTMENT OF AGRICULTURE, DEFENDANT.

Hon. Louis F. Oberdorfer

SUPPLEMENTAL DECLARATION OF JOHNIE B. BLAKE

I, Johnie B. Blake, a plaintiff in this case, hereby declare [*sic*] as follows:

1. This declaration supplements by [*sic*] earlier declaration made in this case. As a member of UAW Local 499, I was engaged in a strike against my employer, beginning in April 1983. The membership of our local voted to return to work and cease strike activity in November 1984, but the employer refused to rehire the strikers.

2. My address and household composition are unchanged.

3. Following the vote of our local membership to return to work, I applied for and am now receiving $103 a month in Food Stamps. I had some initial difficulty in obtaining these stamps, despite the fact that the strike had ended. The local Food Stamp Office refused to accept a

statement from my local union, and I had to have a UAW lawyer contact the local Food Stamp Office.

4. Since my first declaration, my monthly budget has changed. For the seven people in my household, our monthly income includes $250 a month received by my daughter, Charisse, as an aid to families with dependent children grant, $660 per month in foster care payments for my three grandsons who have been placed in my care by the Department of Public Aid, and $100 per month in strike benefits.

5. Our gas was turned off because of back bills owing to the gas company of about $733. The UAW paid that bill so that our gas was turned back on. However, I am unsure of how I will pay future gas bills, especially in light of the extremely low temperatures that we have experienced in Rockford during January.

6. I owe $62 on my water bill and $32 on my sanitary (sewage) bill. If I am not able to pay these bills soon, my water may be turned off.

7. I have not yet paid my January mortgage payment, but I hope to do so soon.

8. While the receipt of Food Stamps assists my household in the purchase of food, I am still having trouble keeping up with bills. If I was to receive Food Stamps for months since the strike began, I would be able to pay off back bills and ensure payment of my gas bill and mortgage.

9. In June 1983, after my grandsons were placed with me by the Department of Public Aid, I attempted to file an application for Food Stamps. I was advised by the local welfare office that they did not take applications from strikers, because federal law prevented the payment of Food Stamps to strikers. I was only permitted to file an application in June 1983, after I insisted upon doing so.

10. Soon after our strike began in April 1983, the employer hired replacements for the striking workers.

When I applied for benefits in June of 1984, I had been "permanently replaced" by the employer. Despite this, my application for Food Stamps was not approved.

Further Affiant sayth not.

* * *

Pursuant to 28 U.S.C. Section 1746, I declare under penalty of perjury that the foregoing is true and correct.

/s/ JOHNIE B. BLAKE
Johnie B. Blake

Executed on February ____, 1985.

STATE OF ILLINOIS)
) ss.
COUNTY OF WINNEBAGO)

AFFIDAVIT

I, Samuel F. Casazza, being duly sworn upon my oath, hereby depose and say:

1. I am Subregional Director of the UAW in Rockford, Illinois. I have been the servicing representative for UAW Local 449 for about 7 years. UAW Local 449 represents the employees of Keystone Consolidated Industries' Rockford division or divisions, which at various times have been known as National Lock Division, National Lock Corp., National Metalcrafters, Inc. and National Metalcrafters (hereinafter "Keystone" or "Company").

2. In late 1981, Keystone sought major contract concessions from the Union midterm in a collective bargaining agreement, which was in effect until April 1983. The Company threatened to relocate operations absent concessions. Negotiations commenced and although the Union offered concessions of about $2.23 per hour, no agreement was reached because the Company never moved from its initial request for $3.85 per hour and offered no significant job guarantees in exchange for concessions. During this period of time, the Company refused to bargain about its proposed relocation of the lock department, asserting that its decision on that relocation was final.

3. After negotiations were unsuccessful, Keystone relocated the lock department (to South Carolina), secondary fastener operations (to Indiana) and cabinet hardware operations (to South Carolina), all without the Union's consent. The Union filed unfair labor practice charges and on April 16, 1983 struck in protest of the unfair labor practices. Johnie Blake was one of the

employees who went out on strike. The Regional Director of Region 33 of the National Labor Relations Board (NLRB) issued a complaint against Keystone, National Metalcrafters, Inc. and National Lock Corp. in Case No. 33-CA-6157. After a hearing, Judge Elbert Gadsden found that the Company violated the National Labor Relations Act by unilaterally relocating the lock department. He ordered the Company, among other remedies, to return the lock department to Rockford, reinstate all affected employees and pay them back pay.

4. The Company appealed the decision to the full Board and the Union appealed the Judge's failure to rule on the legality of the other two relocations, on which the General Counsel sought to withdraw the complaint because the Board reversed itself in the *Milwaukee Spring II* case. The appeals are pending.

5. After the Judge ruled, the Union made an unconditional offer to return to work on behalf of all employees. The Company, which had been operating with replacements since shortly after the strike began, refused to reinstate the employees. In Case No. 33-CA-7074, the Regional Director of Region 33 issued another complaint against the Company. He alleged in the complaint that the employees are unfair labor practice strikers and that the Company's refusal to reinstate them to their jobs violates the National Labor Relations Act.

6. In addition to these cases, after the strike began, the Company refused to pay the strikers their full vacation pay which they had earned. After claims with the Illinois Department of Labor were filed, the State demanded that the Company make the payments. Instead, the Company sued the State in federal court, claiming federal preemption by ERISA and the National Labor Relations Act. *National Metalcrafters v. McNeil, et al.*, Case No. 84 C 2190, United States District Court for the Northern District of Illinois. Judge George Leighton recently granted summary

judgment for the State and the employees. The Company also terminated retirees' insurance in May 1983. A lawsuit has been filed. *UAW and its Local, 449, et al. v. Keystone Consolidated Industries, Inc.*, 84 C 20213, (N. D. Ill.). Keystone and a number of its officers and directors have also been sued for breach of fiduciary duty by a number of participants in the pension plan covering Local 449 members and retirees. *Sandoval, et al. v. Simmons, et al.*, 83-1223 (C. D. Ill.). Related cases were filed by the U.S. Department of Labor (*Donovan v. Simmons, et al.*, 83-1115 (C. D. Ill.), and the Jefferson Trust and Savings Bank, *Jefferson Trust and Savings Bank of Peoria v. Simmons, et al.*, 83-1101 (C. D. Ill.). These two actions have been settled but *Sandoval, et al.* is scheduled for trial.

In Case No. 33-CA-6877, the Regional Director of Region 33, after an investigation, found merit to the Union's charge that one of the striking employees was unlawfully terminated. In Case No. 33-CA-6683, he found merit to the Union's charge that during the strike the Company unlawfully cut off insurance benefits for disabled employees. Both cases were settled prior to trial. The Union has filed additional unfair labor practice charges against Keystone involving the manner in which the Company is administering striker reinstatement and additional unilateral changes. Those charges remain pending.

/s/ SAMUEL F. CASAZZA
Samuel F. Casazza

Subscribed and sworn
to before me this 8th
day of February, 1985.

/s/ SUZANNE C. MCDONALD
Notary Public

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 84-3303

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, ET AL. PLAINTIFFS

v.

JOHN R. BLOCK, SECRETARY,
U.S. DEPARTMENT OF AGRICULTURE, DEFENDANT.

AFFIDAVIT OF BARM COMBS

I, Barm Combs, hereby depose and say as follows:

1. I reside at HCR 75, Box 9210, Hindman, Kentucky, 41822.

2. I was hired at Brush Creek Coal Company II on November 22, 1981, when it was called Ball Branch Coal Company. This coal mine is located on Jones Fork, in Big Springs in Knott County, Kentucky.

3. Brush Creek Coal Company II was a unionized operation and I joined Local Union 1645, U.M.W.A., as soon as I began my employment there.

4. The U.M.W.A. called a strike against Brush Creek Coal Company on August 1, 1984. I went out on strike on that date, along with the other members of the U.M.W.A. bargaining unit at Brush Creek Coal Company.

5. During the next four months, I participated in the strike and walked the picket line.

6. Approximately one week after coming out on strike on August 1, 1984, I called the food stamp office and was advised that I was not eligible for food stamps due to my being on strike. Approximately the first week in

September, 1984, I applied for food stamps and my application was denied on September 17, 1984, due to the fact that I was on strike. I applied for food stamps a second time in approximately November, 1984. This application was denied about a week later for the same reason.

7. During the strike, I was responsible for my wife, Patricia Ann Combs, age 39; and my four children, Jeffrey Combs, age 15; Jimmy Ray Combs, age 13; Jennifer Ann Combs, age 8; and Kala Lynn Combs, age 3.

8. In early December, 1984, I reported to my local union hall and told Carl Shoupe, International Representative, that I could no longer last on the picket line and I was going to have to take a job at a non-union coal mine. At this time I had the following debts:

a. $350.00 a month for food.
b. $338.00 a month house payment.
c. $57.00 a month gas bill.
d. $35.00 a month electric bill.
e. $15.00 a month for laundry.
f. $156.00 a month for car payment.
g. $50.00 a month to maintain and use car, including insurance payments.
h. $25.00 a month for medical expenses.

I was current on the aforementioned bills but was borrowing money from my wife's Aunt to make the mortgage payment on the house. My daughter Jennifer Ann, who has serious kidney problems, was missing needed medical treatment and medication, and my marital relationship was being strained by lack of money.

9. In early December, 1984, I went to work for Bob Jones, a non-union coal operator, with a mine located on Caney Creek in Knott County, Kentucky.

10. At the time I went to work for Bob Jones and left the Brush Creek strike, I knew I would have to give up my U.M.W.A. membership and pay a new initiation fee to rejoin the union if I ever went back to a U.M.W.A. job.

11. Prior to abandoning the strike and going to work for Bob Jones I was advised by a person at the food stamp office that if I obtained employment for even one day, I would become eligible for food stamps. After going to work for Bob Jones but before receiving a pay check, I did become eligible for one month's food stamps for December, 1984, in the amount of approximately $300.00.

12. By abandoning the strike and going to work for a non-union operator, I was also able to secure a loan which enabled me to buy shoes and winter clothing for my children. Had I had food stamps I would have had enough money to have bought this necessary clothing.

13. When the U.M.W.A. strike was over at Brush Creek Coal Company and a new union contract signed, in April, 1985, I was recalled to work at that location. At that time I rejoined the U.M.W.A. and paid the $200.00 initiation fee.

14. I believe that if I had gotten food stamps to help my family during the strike against Brush Creek Coal Company, I could have stayed on the picket line throughout the strike and would not have abandoned my union membership.

15. The inability of the bargaining unit members of Brush Creek Coal Company to receive food stamps affected the moral of the bargaining unit members during this lengthy strike. The financial strain on the bargaining unit members which resulted in part from the inability to obtain food stamps caused dissension between the bargaining unit members and the International Union in regards to the level of strike benefits being paid and the U.M.W.A.'s ability to effectively negotiate and obtain a satisfactory contract.

The foregoing Affidavit has been read to me and the statements contained therein are true.

/s/ BARM COMBS
BARM COMBS

STATE OF KENTUCKY)
)
COUNTY OF PERRY)

Subscribed to and sworn to before me by Barm Combs this the 18th day of December, 1985.
My Commission Expires: 9-22-88

/s/ JAMES R. HAMPTON
NOTARY PUBLIC, STATE AT LARGE, KENTUCKY

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, ET AL. PLAINTIFFS,

v.

JOHN R. BLOCK, SECRETARY, UNITED STATES DEPARTMENT OF AGRICULTURE, DEFENDANT.

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28 U.S.C. § 1746 STATEMENT OF MARK DYER

Mark Dyer, a member of the United Mine Workers of America, hereby makes his statement in the above action.

1. He is an adult resident citizen of the United States and the State of Kentucky, residing at HCR 75, Box 9205, Hindmen, Kentucky 41822.

2. He is an employee of Brush Creek Coal Co. No. 2, and a member of Local 1645 of the United Mine Workers of America.

3. Since on or about August 1, 1984, he has been on strike protesting the refusal of Brush Creek Coal Co. No. 2 to recognize its obligations under, and to abide by, the 1981 National Bituminous Coal Wage Agreement.

4. On October 17, 1984, Region 9 of the National Labor Relations Board issued a complaint against Brush Creek Coal Co. No. 2 for violations of Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(a)(1) and (5), *In the Matter of Charles Brush Creek Coal Co., Inc. and L & T Coal Co., Inc. and United Mine Workers of America,* Nos. 9-CA-21160-3 and -4. A hearing in the above matter is presently set before an Administrative Law Judge in Pikeville, Kentucky beginning on November 27, 1984.

5. He is married and has four children. A reasonable approximation of his essential monthly obligations for his family is as follows:

(a) $400.00 a month for food;
(b) $50.00 a month for gas;
(c) $140.00 a month for his truck payment;
(d) $50.00 a month to operate the truck;
(e) $15.00 a month for electricity; and
(f) $10.00 a month for laundry.

While he and his wife have recently separated, he still provides the sole source of income for himself and his family.

6. His only income at present is $150.00 a week in strike benefits and a $100.00 deductible medical insurance plan provided by the United Mine Workers of America.

7. He owns his home, a 1978 Datsun truck that he still makes payments on, and a 1972 Buick, which his wife drives. He has no savings account, no checking account, no stocks, no bonds and no luxury items of any kind. Since the strike began, living on just the strike benefits has been very hard.

8. He applied for food stamps in early August, but his application was denied because he was a striker.

9. He is financially unable to secure the necessities of life for himself and his family and the receipt of food stamps would assist him by increasing his ability to purchase food.

I STATE, UNDER PENALTY OF PERJURY, THAT THE FOREGOING IS TRUE AND CORRECT.

/s/ MARK DYER
MARK DYER

Executed on this 28th day of Dec., 1984.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 84-3303

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, ET AL. PLAINTIFFS

v.

JOHN R. BLOCK, SECRETARY,
U.S. DEPARTMENT OF AGRICULTURE, DEFENDANT.

AFFIDAVIT OF MARK DYER

I, Mark Dyer, hereby depose and say as follows:

1. I reside at HCR 75, Box 9600, Hindman, Kentucky, 41822.

2. I was hired at Brush Creek Coal Company II in mid-July, 1984. This coal mine is located on Jones Fork, in Big Springs in Knott County, Kentucky.

3. Brush Creek Coal Company II was a unionized operation and I joined Local Union 1645, U.M.W.A., as soon as I began my employment there.

4. The U.M.W.A. called a strike against Brush Creek Coal Company on August 1, 1984. I went out on strike on that date along with the other members of the U.M.W.A. bargaining unit at Brush Creek Coal Company.

5. During the next nine months, I participated in the strike and walked the picket line.

6. In approximately the first week of September, 1984, I applied for food stamps at the Hindman office of the Kentucky Cabinet for Human Resources and on September 18, 1984, I was denied food stamps because of my striker status.

7. During the strike I was responsible for my wife, Geneva Dyer; my son, Anthony Wayne Dyer, age 10; my son Marcus Dyer, age 9; my son Jeremy Keith Dyer, age 6; and my daughter Sheila Ann Dyer, age 4.

8. During the strike I began having severe marital problems due in large part to lack of money associated with being on strike and my inability to receive food stamps. These problems resulted in my wife and children leaving me in approximately December, 1984. My wife then became eligible for and did receive food stamps from approximately December, 1984, and for the duration of the strike.

9. The inability of the bargaining unit members of Brush Creek Coal Company to receive food stamps affected the moral of the bargaining unit members during this lengthy strike. The financial strain on the bargaining unit members which resulted in part from the inability to obtain food stamps caused dissension between the bargaining unit members and the International Union in regards to the level of strike benefits being paid and the U.M.W.A.'s ability to effectively negotiate and obtain a satisfactory contract.

The foregoing Affidavit has been read to me and the statements contained therein are true.

/s/ MARK DYER
MARK DYER

STATE OF KENTUCKY)
)
COUNTY OF PERRY)

Subscribed to and sworn to before me by Mark Dyer this the 18th day of December, 1985.

My Commission Expires: 9-22-88

/s/ JAMES R. HAMPTON
NOTARY PUBLIC, STATE AT LARGE, KENTUCKY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 84-3303

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW,

AND

UNITED MINE WORKERS OF AMERICA, PLAINTIFFS,

v.

JOHN R. BLOCK, SECRETARY,
UNITED STATES DEPARTMENT OF AGRICULTURE,
DEFENDANT.

Hon. Louis F. Oberdorfer

DECLARATION OF JOHN R. FRANK

1. My name is John R. Frank.

2. I work for Caterpillar Tractor Company in York, Pennsylvania. Our union, UAW Local 786, was on strike against Caterpillar from October, 1982 to April, 1983. I make this declaration based on personal knowledge and I am competent to testify to the matters stated herein.

3. I have four children who were aged eighteen, sixteen, fifteen and eleven at the time of the strike.

4. During the strike period, our family never received Food Stamps. We were told that we were ineligible because I was a striker.

5. My wife was working at that time but her net pay added to my union strike benefits was not enough to feed our family and make payments on our house mortgage. The mortgage company would not accept the small amount that we could afford to pay after feeding the

family and this resulted in a foreclosure on our home. If we had had Food Stamps, we, naturally, would have had more money to put toward our house payments and, perhaps, would have forestalled the foreclosure.

6. As a result of the heavy financial strain, aggravated by the lack of Food Stamps, I voted for a poor contract in order to get back to work.

I hereby affirm, under penalty of perjury, that the foregoing is true and accurate to the best of my knowledge and belief.

Dec 14, 1985
Date

/s/JOHN R. FRANK
Signature

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 84-3303

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW,

AND

UNITED MINE WORKERS OF AMERICA, PLAINTIFFS,

v.

JOHN R. BLOCK, SECRETARY,
UNITED STATES DEPARTMENT OF AGRICULTURE,
DEFENDANT.

Hon. Louis F. Oberdorfer

DECLARATION OF WILLIAM FREITAG

1. My name is William Freitag.

2. I work for Caterpillar Tractor Company in Aurora, Illinois. Our union, UAW Local 145, was on strike against Caterpillar from October, 1982 to April, 1983.

3. Because I was the sole bread winner for my family, I had voted against the strike. However, majority rules and there was a strike.

4. At the time of the strike, I was married and my children were aged six and four.

5. We received Food Stamps at first, but then were denied. We were told that we were ineligible because I was a striker.

6. I limited myself to one meal a day so that there would be more food for the rest of the family. Food stamps were denied to every other member of the family,

even though they had nothing to do with the strike but were denied benefits just because of their relationship to me.

7. The stress of trying to feed our children and ourselves on a limited income without Food Stamps and other financial problems placed a great strain on my marriage. In addition, my wife received substantial verbal abuse from the Department of Public Aid when she attempted to get Food Stamps while I was on strike. My wife had a history of emotional problems and was unable to take the stress. The stress caused by the inability to get Food Stamps contributed to the break-up of our marriage.

I hereby affirm, under penalty of perjury, that the foregoing is true and accurate to the best of my knowledge and belief.

12/4/85	/s/WILLIAM FREITAG
Date	Signature

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF COLUMBIA

Civil Action No. 84-3303

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW

AND

UNITED MINE WORKERS OF AMERICA, ET AL. PLAINTIFFS,

v.

JOHN R. BLOCK, SECRETARY, UNITED STATES DEPARTMENT OF AGRICULTURE, DEFENDANT.

Hon. Louis F. Oberdorfer

DECLARATION OF CHARLES GIBBONS

Charles Gibbons state [*sic*] his declaration as follows:

1. I am Business Agent for UAW Local 365 in New York, New York. I make this declaration based upon my own personal knowledge and I am competent to testify to the matters stated herein.

2. During 1983, I was Chairman of the Bargaining Committee at Potdevin Machine Company in Teterboro, New Jersey. The Company hired an outside labor consultant to conduct collective bargaining negotiations that year.

3. The Company made a number of take back demands in negotiations; including 53 cents an hour in wage reductions, 3½ fewer sick days, and 2 less holidays. In addition, the Company sought changes in contract language relating to greater management ability to pro-

mote to certain jobs out of the line of seniority and fewer protections against foremen performing bargaining unit work.

4. In response to these concession demands, UAW Local 365 members at Potdevin Machine Company began a strike beginning February 26, 1983. About two weeks into the strike, we advised all members to apply for Food Stamps and unemployment insurance. Both were denied. Food Stamps were denied because the members were on strike.

5. The strike continued and little or no negotiations occurred for several weeks. The Company operated the plant at less than normal output with supervisors and summer help.

6. In late September 1983, the local bargaining committee took a company offer to the membership for ratification which included all the Company's take back demands. In addition, the Company had decided to only recall 40 of the approximately 55 remaining strikers.

7. The Bargaining Committee did not recommend the settlement, but the membership ratified the settlement around September 27, 1983, and returned to work soon after. I voted against the settlement.

8. The denial of Food Stamps was one contributing factor in the willingness of the membership to accept an unsatisfactory agreement after a lengthy strike.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ CHARLES GIBBONS
CHARLES GIBBONS

Executed on: December 18, 1985

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 84-3303

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, AND UNITED MINE WORKERS OF AMERICA, ET AL. PLAINTIFFS,

v.

JOHN R. BLOCK, SECRETARY, UNITED STATES DEPARTMENT OF AGRICULTURE, DEFENDANT.

The Hon. Louis F. Oberdorfer

AFFIDAVIT OF DONALD GIBSON

I, DONALD GIBSON, upon personal knowledge, do hereby affirm the following:

1. I reside at 422 West Wolfe Street, Harrisonburg, Virginia 22801.

2. I reside with my mother, Frances Gibson.

3. On October 27, 1972, I began working for Marval as a turkey washer. By 1984, I was performing janitorial work for Marval.

4. On June 2, 1984, I went on strike—along with other employees of Marval, in furtherance of the contract demands of our long-time certified exclusive bargaining representative, Local 400, United Food and Commercial Workers, International Union, AFL-CIO, CLC, and to protest unfair labor practices by Marval. During June 1984, the company began hiring permanent replacements for the strikers.

5. The National Labor Relations Board has issued a complaint on the union's unfair labor practice charge

alleging that Marval's withdrawal of recognition was illegal (Att. A). I have been told that further investigation is ongoing in this case.

6. In August 1984, I tried to get my job back at Marval and was told by a Marval representative, Mr. John Gray, that I had been permanently replaced and could not have my job back.

7. I called Marval again in February 1985 seeking to get my job back and was told by Barbara Ward of the Personnel Department that nothing could be done since my old job had been filled.

8. I also filed an unfair labor practice charge against Marval claiming that Marval's refusal to reinstate me was illegal. That charge is still pending (Att. B).

9. I have been receiving benefits from the union's strike fund since I went on strike.

10. Our household, which is headed by my mother, began receiving food stamps on October 25, 1984.

11. In July 1985, my mother sought recertification for food stamps and was told by the local food stamp agency not only that the household was ineligible because I was considered a "striker," but also that we shouldn't ever have been receiving food stamps since I was considered a "striker" the whole time we had been receiving food stamps.

12. The local food stamp agency also sent a letter to my mother demanding that she repay the agency the full value of all food stamps we received since October 25, 1984 (the date we first started getting food stamps). (Att. C).

13. Since the local agency said the household was ineligible because I was a "striker", the recertification process was not completed in July 1985, and so we stopped getting food stamps.

14. We appealed the local agency's action to the State Hearing Authority (Virginia Department of Social Services) which on October 18, 1985 upheld the local agency's action. The decision (Att. D) stated:

1. There appears to be very little doubt that Mr. Gibson has been replaced by Marval. However, the fact that Mr. Gibson is still a member of the Union and still receiving strike pay will preclude his eligibility for food stamps.
2. Mr. Gibson will be considered a striker by the Agency based on his circumstances. He is still a member of the Union and still receiving strike pay. The policy memo attached does not address that situation.

15. On October 24, 1985, the State Hearing Authority's decision was appealed to the Virginia State Board of Welfare (Att. E), but that appeal hasn't been decided yet.

This is the end of my affidavit.

/s/ DONALD W. GIBSON
DONALD GIBSON

Commonwealth of Virginia
County of Rockingham, to-wit:

SUBSCRIBED AND SWORN to before me this the 21st day of November, 1985.

/s/ PHYLLIS B. TYSON
Notary Public

My Commission Expires: October 11, 1988

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 84-3303

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, AND UNITED MINE WORKERS OF AMERICA, ET AL. PLAINTIFFS

v.

JOHN R. BLOCK, SECRETARY, UNITED STATES DEPARTMENT OF AGRICULTURE, DEFENDANT

The Honorable Louis F. Oberdorfer

AFFIDAVIT OF ZOLA HIGGINS

Commonwealth of Virginia)
) ss
County of Rockingham)

I, ZOLA HIGGINS, upon personal knowledge, do hereby affirm the following:

1. I reside at 223 Reservoir Street, Harrisonburg, Virginia 22801.

2. I began working for Marval Poultry Company, Inc., in about October 1977. As of June 1, 1984, my job was to be a grader in the tray pack department.

3. On June 2, 1984, I went on strike—along with other employees of Marval, in furtherance of the contract demands of our long-time certified exclusive bargaining representative, Local 400, United Food and Commercial Workers, International Union, AFL-CIO, CLC, and to protest unfair labor practices by Marval. During June

1984, the company began hiring permanent replacements for the strikers. It is my understanding that I have been replaced.

4. The National Labor Relations Board has issued a complaint on the union's unfair labor practice charge alleging that Marval's withdrawal of recognition was illegal (Att. A). I have been told that further investigation is ongoing in this case.

5. I have been receiving benefits from the union's strike fund since I went on strike.

6. In about July 1984, I applied for food stamps at the Food Stamp Office for the City of Harrisonburg, 1598 S. Main Street, Harrisonburg, Virginia. At that time, I spoke with one of the employees of the office, Beth Goldie, and I completed the forms to obtain food stamps. Thereafter, I received a letter from the office which stated that I was not eligible for food stamps because I was on strike. I do not now have a copy of this letter.

7. On or about August 31, 1984, I telephone Ms. Goldie's supervisor to discuss the issue. The supervisor, whose name I cannot now recall, informed me that I was not eligible for food stamps because I was on strike. She stated that the food stamp office also looked at the amount of money I had made from my employment with Marval to determine my ineligibility.

8. On or about February 7, 1985, I contacted Beth Goldie again about food stamps. She stated that I was not eligible to receive food stamps because I was on strike.

9. In September 1985, my husband, William Higgins, with whom I live, applied for food stamps. My husband is currently unemployed. Beth Goldie informed him, so he told me, that he could not receive food stamps because I was on strike.

10. On or about November 18, 1985, I telephone Beth Goldie to review my efforts to obtain food stamps. She stated that the reason I never received food stamps was

because I was on strike. At no time did she ask me whether I had been replaced by Marval.

This is the end of my affidavit.

/s/ ZOLA VIOLET HIGGINS
ZOLA HIGGINS

SUBSCRIBED AND SWORN to before me this 20th day of November, 1985.

/s/ DOROTHEA M. ALTON
Notary Public

My Commission Expires: October 29, 1989

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF COLUMBIA

Civil Action No. 84-3303

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW,

AND

UNITED MINE WORKERS OF AMERICA, PLAINTIFFS,

v.

JOHN R. BLOCK, SECRETARY, UNITED STATES DEPARTMENT OF AGRICULTURE, DEFENDANT.

Hon. Louis F. Oberdorfer

AFFIDAVIT OF PAUL DAVID MICHEL

I, Paul David Michel, hereby depose and say as follows:

1. I am the coordinator of the Selective Strike Task Force, employed by the International Union, UMWA.

2. Since my appointment as the chief coordinator in April, 1984, I have been assigned to oversee the selective strike program including UMWA District 30, which covers mining operations in eastern Kentucky.

3. In the Spring of 1984, the Union became aware of a number of coal companies operating on coal lands of National Mines Corporation in UMWA District 30; specifically in the Beaver Creek area of Kentucky. These contractors refused to honor the UMWA contract, despite the fact that they had previously signed the UMWA National Bituminous Coal Wage Agreement of 1981. Among these companies was an operation originally known as

H&A Coal Company. This company took the position that it no longer was obligated to recognize the contract because it had changed its corporate name to Charles Brush Creek Coal Company, Inc. and then to Brush Creek Coal Company No. 2.

4. It was the Union's position that these corporate maneuvers did not relieve the company of its contractual obligations and violate the National Labor Relations Act. An unfair labor practice charge was filed at the National Labor Relations Board. Based on its investigation the National Labor Relations Board has issued a complaint against Charles Brush Creek Coal Company, Inc. and its alter-egos, which is scheduled for hearing on March 6, 1985. A copy of this complaint is attached to my affidavit as Michel Exhibit No. 1.

5. As a result of this unfair labor practice, the UMWA International President, Richard L. Trumka, authorized a selective strike against Brush Creek Coal Company No. 2 (the alter-ego of H&A Coal Company and Charles Brush Creek Coal Company, Inc.), effective August 1, 1984. As of the date of this affidavit, the selective strike is still in effect. Plaintiff Mark Dyer is a member of this bargaining unit.

6. Plaintiff Barm Combs is a member of a bargaining unit employed by another contractor in the same location, which is also the subject of an NLRB complaint.

/s/ PAUL DAVID MICHEL
PAUL DAVID MICHEL

Subscribed and sworn to before me
this the 14th day of February, 1985.

/s/
Notary Public

[date illegible]

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF COLUMBIA

Civil Action No. 84-3303

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW,

AND

UNITED MINE WORKERS OF AMERICA ET AL. PLAINTIFFS,

v.

JOHN R. BLOCK, SECRETARY, UNITED STATES DEPARTMENT OF AGRICULTURE, DEFENDANT.

Hon. Louis F. Oberdorfer

Mick Ramsey states his declaration as follows:

1. I am the Community Services Chairman for UAW Local 786, 1650 Whiteford Road, York, Pennsylvania 17402. I make this declaration of my own personal knowledge and I am competent to testify to the matters stated herein.

2. At all times relevant to this declaration, I have served as the Chairman of the Community Services Committee of UAW Local 786 or as a member of that committee.

3. The purposes of the Community Services Committee include providing direct assistance to members of the local who have financial troubles or other hardships, making referrals to appropriate social service agencies in the area, cooperating in the local United Way campaign, and assisting the day-to-day operations of the local United Way agency. During a strike, the Community Services

Committee has the principal responsibility within a local union for assisting strikers and their families who are having trouble paying their bills and meeting their financial obligations.

4. UAW Local 786 serves the bargaining unit employees of the Caterpillar facility located in York, Pennsylvania. Local 786 is affiliated with the International Union, UAW.

5. I have been employed by Caterpillar at their York plant since 1972.

6. The International Union, UAW conducted economic strikes against the Caterpillar Corporation from October 1, 1982 to April 23, 1983, and from October 29, to December 19, 1979. These strikes were conducted during the negotiations for new national collective bargaining agreements between the International Union, UAW and the Caterpillar Corporation.

7. During the 1982-83 strike, I was the Chairman of the Community Services Committee. The strike lasted seven months and many members of the local suffered greatly, especially during the last final weeks of the strike.

8. During this time, the Community Services Committee arranged for needy members of the local to obtain food from church-run food banks in the York area. In addition, the local Salvation Army provided Christmas food packages. We also arranged for donations of wood and coal to help members with home heating.

9. Despite these efforts, many members of the local were unable to pay for necessities and could have benefitted if Food Stamps would have been available.

10. During the 1979 strike, a few members of the local were eligible for Food Stamps and this helped these strikers and their families avoid exreme hardship. In contrast, during the 1982-83 strike we were forced to rely on private efforts which afforded less consistent and less adequate food assistance to those members who were least financially able to participate in the strike.

I declare under penalty of perjury that the foregoing statement is true and correct.

Executed on the 16 day
of December, 1985.

/s/ MICK RAMSEY
Mick Ramsey, Declarant

/s/ JOHN G. AGRESTA
John G. Agresta, Notary Public
Springettsbury TWP., York County

My Commission Expires Aug. 13, 1988
Member, Pennsylvania Association of Notaries

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 84-3303

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW,

AND

UNITED MINE WORKERS OF AMERICA, PLAINTIFFS,

v.

JOHN R. BLOCK, SECRETARY,
UNITED STATES DEPARTMENT OF AGRICULTURE, DEFENDANT.

Hon. Louis F. Oberdorfer

DECLARATION OF ROBERT J. RIBOLZI

1. My name is Robert J. Ribolzi.

2. I work for Caterpillar Tractor Company in Aurora, Illinois. Our union, UAW Local 145, was on strike against Caterpillar from October, 1982 to April, 1983.

3. My wife was not working at the time of the strike but did register and looked for work during that period. She was unable to find work. Our children were aged fourteen and eight. I make this declaration based on personal knowledge and I am competent to testify to the matters stated herein.

4. We received Food Stamps for two months but then were denied. We were told that we were ineligible because I was a striker. We were qualified for Food Stamps in every other way. We had never depended on the "system" before and were very upset by the denial. I had always paid taxes and felt I was being discriminated against only

because I was a member of a union. The strike concerned a private contract with a private employer and the government should not side, by denial of the Food Stamps, with the company against the union. The state employees more or less said that there was work for me if I would just cross the picket line which I was unwilling to do.

5. It was an extremely difficult time for us financially. We had to ask for help from my wife's family in order to feed the family. Our savings were used up and we had to refinance our home.

6. Although I, as well as other union members, felt our cause was important and just, we finally voted to accept a contract that was not good, because of our poor financial situations which were aggravated by the lack of Food Stamps to feed our families.

I hereby affirm, under penalty of perjury, that the foregoing is true and accurate to the best of my knowledge and belief.

12/14/85	/s/ ROBERT J. RIBOLZI
Date	Signature

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 84-3303

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW,

AND

UNITED MINE WORKERS OF AMERICA, PLAINTIFFS,

v.

JOHN R. BLOCK, SECRETARY,
UNITED STATES DEPARTMENT OF AGRICULTURE, DEFENDANT.

Hon. Louis F. Oberdorfer

DECLARATION OF ROBERT J. SHORB, JR.

1. My name is Robert J. Shorb, Jr.

2. I work for Caterpillar Tractor Company in York, Pennsylvania. Our union, UAW Local 786, was on strike against Caterpillar from October, 1982 to April, 1983. I make this declaration based on personal knowledge and I am competent to testify to the matters stated herein.

3. At the time of the strike, I was married and my step-children, aged fourteen and eleven, were living with us. My wife was not working.

4. At the time of a previous strike in 1979, we received Food Stamps. However, during the 1982-1983 strike, we were denied Food Stamps. We were told that we were ineligible because I was a striker.

5. My family was under great financial pressure during the strike. We did manage to pay the interest on our house payments and our electricity. However, because we did not receive any Food Stamps, our children were in danger of not having enough to eat. Therefore, we had to send them to live with their grandparents in New York State so that they would get enough nourishment. It was a terrible strain to have our family divided due to the lack of Food Stamps.

6. We believe that the contract that we signed in order to end the strike was not a good one. I voted yes because we were hungry and hurting.

I hereby affirm, under penalty of perjury, that the foregoing is true and accurate to the best of my knowledge and belief.

12/16/85	/s/ ROBERT J.SHORB, JR.
Date	Signature

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 84-3303

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW,

AND

UNITED MINE WORKERS OF AMERICA, ET AL. PLAINTIFFS

v.

JOHN R. BLOCK, SECRETARY,
UNITED STATES DEPARTMENT OF AGRICULTURE DEFENDANT

The Honorable Louis F. Oberdorfer

AFFIDAVIT OF CATHY TRACY

Commonwealth of Virginia)
) ss
County of Rockingham)

I, CATHY TRACY, upon personal knowledge, do hereby affirm the following:

1. I reside at 705 Quadrangle Apartments, Waynesboro, Virginia 22980.

2. I began working for Marval Poultry Company, Inc., on or about June 11, 1981. As of June 1, 1984, I was working as a thigh boner.

3. On June 2, 1984, I went on strike – along with other employees of Marval, in furtherance of the contract demands of our long-time certified exclusive bargaining representative, Local 400, United Food and Commercial Workers, International Union, AFL-CIO, CLC, and to

protest unfair labor practices by Marval. During June 1984, the company began hiring permanent replacements for the strikers. I later learned from co-workers that I had been replaced.

4. The National Labor Relations Board has issued a complaint on the union's unfair labor practice charge alleging that Marval's withdrawal of recognition was illegal (Att. A). I have been told that further investigation is ongoing in this case.

5. I have been receiving benefits from the union's strike fund since I went on strike.

6. My husband, Anthony Tracy, of the above address, also was employed by Marval Poultry Company, Inc., and went out on strike, for the reasons stated above, on June 2, 1984. In about November 1984, Anthony Tracy left the picket line because another job was in the offing, but afterwards this position did not materialize. He is, to my knowledge, no longer considered a member of Local 400 and received no strike benefits after this time.

7. In about December 1984, Anthony and I applied for food stamps, which we began to receive in January 1985. In about the middle of January 1985, I was informed that the Food Stamp Office had learned that I was then on strike from Marval and that, for that reason, we were ineligible for food stamps. I was not asked whether I had been replaced. We were told that we would not receive any additional food stamps and that the food stamp office would be seeking repayment for the food stamps issued in January 1985. We received no additional food stamps after January 1985.

8. In about March 1985, I again applied for food stamps. I was told by a clerk (whose name I cannot now recall) in the food stamp office in Harrisonburg that I was not eligible for food stamps because of the strike. The clerk stated that the food stamp office considered the

income I would have earned from Marval if I had not been on strike as being too high to make me eligible for food stamps.

9. In about April 1985, we received a notice from the Food Stamp Office which states that we were ineligible for food stamps because "we had to count Marval income for Cathy because she was on strike" and which seeks repayment of $195 for the January 1985 food stamps. A copy of this demand letter is appended hereto as Attachment B. We have not repaid the $195 because we are unable to do so.

This is the end of my affidavit.

/s/ CATHY C. TRACY
CATHY TRACY

SUBSCRIBED AND SWORN to before me this 26 day of November, 1985.

/s/ DOROTHEA M. ALTON
Notary Public

My Commission Expires: October 29, 1989

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF COLUMBIA

Civil Action No. 84-3303

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW,

AND

UNITED MINE WORKERS OF AMERICA, PLAINTIFFS,

v.

JOHN R. BLOCK, SECRETARY,
UNITED STATES DEPARTMENT OF AGRICULTURE,
DEFENDANT.

Hon. Louis F. Oberdorfer

DECLARATION OF RAY WESTFALL

I, Ray Westfall, state my affidavit as follows:

1. I am an International Representative for Region 1A of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW. I service UAW Local 985, whose members are employees of the Plymouth Stamping Company, which is located in Plymouth, Michigan.

2. A strike was authorized at the Plymouth Stamping Plant on September 9, 1980, after the labor agreement between the UAW the Plymouth Stamping Company had expired and the employer refused to bargain in good faith with the union. The employer made across-the-board demands for concessions and showed little interest in union proposals. Non-union employees were hired to replace the striking workers in October 1980.

3. Unfair labor practice charges were brought against the employer and, following a hearing, in December 1982 the Administrative Law Judge issued a decision in Case Nos. 7-CA-17416 and 7-CA-19179, finding that the employer failed to bargain in good faith. The employer was ordered to meet and bargain with the union in good faith and reinstate the striking workers with back pay and full seniority and other rights and privileges.

4. The employer has refused to comply with the Administrative Law Judge's order. An appeal was filed in February 1983 and is still pending.

5. The members of UAW Local 985 remain on an unfair labor practice strike, while non-union employees are working at the Plymouth Stamping Plant.

6. The strike has lasted for well over four years and has caused extreme hardship to the strikers and their families. The financial burdens attending a strike of such long duration have forced many members of Local 985 to abandon the effort to force their employer to comply with the labor laws.

7. The remaining active strikers meet weekly, engage in picket line duty, and receive strike insurance benefits. The last collective bargaining occurred in January 1983.

* * * *

I declare under penalty of law that the foregoing is true and correct.

/s/ RAY WESTFALL
Ray Westfall

Executed on February 15, 1985

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 84-3303

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, ET AL., PLAINTIFFS,

v.

JOHN R. BLOCK, SECRETARY, U.S. DEPARTMENT OF AGRICULTURE, DEFENDANT.

PLAINTIFF JOHNIE B. BLAKE'S ANSWERS TO DEFENDANT'S FIRST SET OF INTERROGATORIES

Now comes Plaintiff Johnie B. Blake and in response to Defendant's First Set of Interrogatories submits the following answers.

INTERROGATORIES

Interrogatory No. 1

What is the name and address of the employer against whom you went out on strike?

Answer:

Keystone Consolidated Industries, Inc. The Company was formerly known as the National Lock Division of Keystone and now calls itself National MetalCrafters Inc.
4500 Kishwaukee St., P.O. Box 7005
Rockford, IL 61125-7005

Interrogatory No. 2

Are you still on strike?

Answer:

No. The strikers made an unconditional offer to return to work in October 1984. The Company has not reinstated many of the strikers, however.

Interrogatory No. 3

If your answer to Interrogatory No. 2 is negative:

a. When did you return to work?
b. Give the name and address of your employer.
c. State your job title and salary.

Answer:

I have not returned to work.

Interrogatory No. 4

What was the title and salary of the job you held before going on strike?

Answer:

Quality Control Inspector.
$10.90 per hour.

Interrogatory No. 5

What strike benefits have you received while you have been on strike, and when did you receive them?

Answer:

After the strike began, I received three weeks of benefits at $65.00 per week. In May, 1983 the amount increased to $85.00 per week. From about October, 1983 to April, 1984, benefits were discontinued when strikers received unemployment compensation. About April, 1984, the $85.00 per week was renewed. After the unconditional offer to return to work in October, 1984, strike benefits were no longer paid.

Interrogatory No. 6

What are the title and salary of the job you would be entitled to (or would expect to get, as the case may be) if you returned to work?

Answer:

I would expect to return to the same job. The Company has reduced the pay rate since the strike. I am not sure of the current salary.

Interrogatory No. 7

Have you or has anyone in your household ever applied for food stamps?

Answer:

Yes.

Interrogatory No. 8

If your answer to Interrogatory No. 7 is affirmative, state the date of each such application, and the action taken on the application.

Answer:

My daughter Charisse applied for food stamps in about June 1982 when her daugher was born. She was awarded food stamps for herself and her daughter. In about June 1983 my three grandsons came to live with me and I applied for food stamps for them. The application was denied because I was on strike and Charisse's food stamps were cut off based on my status as a striker. In about September 1983, Charisse applied for food stamps again and was denied. In about July 1984, I applied for food stamps again because I had been permanently replaced but was denied as a striker. I applied in about November 1984 after the unconditional offer to return to work and was awarded food stamps.

Interrogatory No. 9

Has your household ever received food stamps?

Answer:

Yes.

Interrogatory No. 10

If your answer to Interrogatory No. 9 is affirmative state (a) the dates during which your household received food stamps, (b) the size of the allotments, and (c) the state and county from which you received them.

Answer:

1. (a) June 1982-June 1983 (b) $132.00 (c) Winnebago County, Illinois. See answer to Interrogatory No. 8.
2. (b) November 1984-December 1985 (b) $18.00 (c) Winnebago County, Illinois.
3. (a) December 1985-present (b) $98.00 (c) Winnebago County, Illinois.

Interrogatory No. 11

Identify by name, age and relation to you each person who has been a member of your household since you first went on strike.

Answer:

Charles Blake – son – age 18
Charisse Blake – daugher – age 22
Rowena Blake – granddaughter – age 3
Cabarik – grandson – age 11
Akee – grandson – age 5
Lamar – grandson – age 7

Interrogatory No. 12

When did you join the United Auto Workers?

Answer:

About 1972.

Interrogatory No. 13

What unions other than the United Auto Workers have you been a member of, and when?

Answer:

International Association of Machinists and Aerospace Workers.

About 1960-1971.

Interrogatory No. 14

Give the starting and ending dates of every strike you have participated in.

Answer:

I do not recall participating in any other strike.

Of Counsel:

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Attorneys for Plaintiffs

By: /s/ WENDY L. KAHN
Wendy L. Kahn

STATE OF ILLINOIS)
) ss.
COUNTY OF WINNEBAGO)

VERIFICATION

I, Johnie B. Blake, have read the foregoing Interrogatories and Answers to Interrogatories and state, under oath, that the answers given are true and correct to the best of my knowledge and belief.

/s/ JOHNIE B. BLAKE

Subscribed and sworn to
before me this 9 day
of January, 1986.

/s/ DORIS E. CORNELIUS

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 84-3303

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, AND UNITED MINE WORKERS OF AMERICA, ET AL. PLAINTIFFS,

v.

JOHN R. BLOCK, SECRETARY, UNITED STATES DEPARTMENT OF AGRICULTURE DEFENDANT.

The Honorable Louis F. Oberdorfer

CERTIFICATE OF SERVICE

I hereby certify on this 10th day of January, 1986 that a copy of PLAINTIFF JOHNIE B. BLAKE'S ANSWERS TO DEFENDANT'S FIRST SET OF INTERROGATORIES was mailed, first class, postage prepaid to:

Sheila Lieber, Esq.
James A. Gardner, Esq.
U.S. Department of Justice
Civil Division, Room 3706
10th and Pennsylvania Avenue, N.W.
Washington, D.C. 20530

/s/ WENDY L. KAHN
WENDY L. KAHN

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

CIVIL ACTION NO. 84-3303

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, ET AL.
PLAINTIFFS

v.

JOHN R. BLOCK, SECRETARY, U.S. DEPARTMENT OF AGRICULTURE DEFENDANT

PLAINTIFF MARK DYER'S ANSWERS TO DEFENDANT'S FIRST SET OF INTERROGATORIES

INTERROGATORY NO. 1

Brush Creek Coal Company, Box 788, Prestonsburg, Kentucky, 41653.

INTERROGATORY NO. 2

I am no longer on strike.

INTERROGATORY NO. 3

(a) I returned to work on April 26, 1985, after the strike ended. The Union and company signed a new collective bargaining agreement on April 2, 1985.

(b) Charles Brush Creek Coal Company, Brush Creek No. 2, Box 778, Prestonsburg, Kentucky, 41653.

(c) Shot firer. Wage rate: $109.14 per shift.

INTERROGATORY NO. 4

Shot firer. Wage rate: $100.00 per shift.

INTERROGATORY NO. 5

During the strike against Brush Creek Coal Company, I received $150.00 per week until January 28, 1985, and $200.00 per week until approximately April 2, 1985, when the strike ended. In addition, I received a health services card with a $100.00 deductible per dependent.

INTERROGATORY NO. 6

See answer to Interrogatory No. 3 above.

INTERROGATORY NO. 7

Yes.

INTERROGATORY NO. 8

I applied for food stamps before I went to work at Brush Creek Coal Company, when I was unemployed due to a layoff. I was able to receive food stamps at that time.

I applied for food stamps approximately the first week in September, 1984, during the strike against Brush Creek Coal Company. On September 18, 1984, my application for food stamps was denied because of my striker status.

INTERROGATORY NO. 9

Yes.

INTERROGATORY NO. 10

(a) My household has received food stamps several times prior to the strike. The last time I recall was approximately January, 1984, to approximately July, 1984.

(b) The size of this last allotment was between $250.00 and $300.00 per month.

(c) I received these food stamps from Knott County, Kentucky.

In addition, my wife, Geneva Dyer, and I split up during the strike in part due to problems associated with lack of income from the strike. She then started receiving approximately $250.00 worth of food stamps from Knott County, Kentucky, from approximately December, 1984, and for the duration of the strike.

INTERROGATORY NO. 11

When I first went out on strike, the following people were members of my household: Geneva Dyer, wife, 25 years old; Anthony Wayne Dyer, son, 10 years old; Marcus Dyer, son, 8 years old; Jeremy Keith Dyer, son, 6 years old; Shiela Ann Dyer, daughter, 4 years old. My wife left me during the strike in approximately December, 1984. She took the children with her.

INTERROGATORY NO. 12

I joined the United Mine Workers in approximately 1971 and remained a member until I lost my membership in 1972 when I left the Union operation where I was working and went to work at a non-union mine. I rejoined the Union when I went to work at Brush Creek Coal Company in approximately July, 1984.

INTERROGATORY NO. 13

None.

INTERROGATORY NO. 14

The only strike in which I have participated was the strike against Brush Creek Coal Company, which began on August 1, 1984, and continued until April 2, 1985.

AFFIDAVIT

I, Mark Dyer, state that I have been read the foregoing Answers to Interrogatories and the information contained therein is true to the best of my knowledge and belief.

/s/ MARK DYER
MARK DYER

STATE OF KENTUCKY)
)
COUNTY OF KNOTT)

Subscribed and sworn to before me by Mark Dyer this the 7th day of January, 1986.
My Commission Expires: 9-22-88

/s/ JAMES R. HAMPTON
NOTARY PUBLIC, STATE AT LARGE, KENTUCKY

Respectfully submitted,

/s/ WENDY L. KAHN
WENDY L. KAHN
ZWERDLING, PAUL, LEIBIG, KAHN, & THOMPSON, P.C.
1025 CONNECTICUT AVENUE, N.W.
WASHINGTON, D.C. 20036
TELEPHONE: (202) 857-5000

CERTIFICIATE OF SERVICE

I hereby certify that a true copy of the foregoing Answers to Interrogatories were served upon the Hon. Sheila Lieber, and the Hon. James A. Gardner, Attorneys, Department of Justice, Civil Division, Room 3706, 10th & Pennsylvania Avenue, N.W., Washington, D.C., 20530, by first class mail, postage prepaid, this the 10th day of January, 1986.

/s/ WENDY L. KAHN
WENDY L. KAHN

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF COLUMBIA

CIVIL ACTION NO. 84-3303

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW,

AND

UNITED MINE WORKERS OF AMERICA, ET AL. PLAINTIFFS,

v.

JOHN R. BLOCK, SECRETARY,
UNITED STATES DEPARTMENT OF AGRICULTURE,
DEFENDANT.

Hon. Louis F. Oberdorfer

ANSWER TO DEFENDANT'S FIRST SET OF INTERROGATORIES TO PLAINTIFF MARY BERRY

The plaintiff, Mary Berry, states her answers to defendant's first set of interrogatories as follows:

Interrogatory No. 1

What is the name and address of the employer against whom you went out on strike?

Response

Plymouth Stamping Division
Eltec Corporation
315 West Ann Arbor Road
Plymouth, Michigan 48170

Interrogatory No. 2

Are you still on strike?

Response

Yes

Interrogatory No. 3

If your answer to Interrogatory No. 2 is negative:
a. When did you return to work?
b. Give the name and address of your employer.
c. State your job title and salary.

Response

I am employed on a part-time basis.
a. August 30, 1985.
b. Wayne Living Center (part of Beverly Enterprises)
4425 S. Venoy
Wayne, MI tel. #326-8700

Beverly Enterprises
3280 Virginia Beach Blvd.
Virginia Beach, Virginia 23452 Tel. #(804) 340-2477
c. Housekeeper, $3.50 an hour.

Interrogatory No. 4

What was the title and salary of the job you held before going on strike?

Response

Hi-Low Driver, $9.36 an hour.

Interrogatory No. 5

What strike benefits have you received while you have been on strike, and when did you receive them?

Response

I received strike insurance benefits in the amount of $65.00 a week from the beginning of the strike in September 1980 until May 1983 when the benefits were increased to $85.00 a week. In November 1984, the benefits were increased to $100.00 a week. In addition, the UAW Strike Insurance Department has paid my monthly health premium.

Interrogatory No. 6

What are the title and salary of the job you would be entitled to (or would expect to get, as the case may be) if you returned to work?

Response

My job title prior to going on strike was "Hi-Low" Driver and my salary was $9.36 an hour. If the union prevails in our unfair labor practice charges, I would be reinstated to this job.

Interrogatory No. 7

Have you or has anyone in your household ever applied for food stamps?

Response

Yes.

Interrogatory No. 8

If your answer to Interrogatory No. 7 is affirmative, state the date of each such application, and the action taken on the application.

Response

In March or April 1981, I applied for and received food stamps for one month for myself and my son. On August 27,1984, I applied for and was denied food stamps because of my status as a striker.

Interrogatory No. 9

Has your household ever received food stamps?

Response

Yes.

Interrogatory No. 10

If your answer to Interrogatory No. 9 is affirmative, state:

a. The dates during which your household received food stamps;

b. The size of the allotments; and

c. The state and county from which you received them.

Response

a. March or April of 1981.
b. Approximately $60.00.
c. County of Wayne, State of Michigan.

Interrogatory No. 11

Identify by name, age and relation to you each person who has been a member of your household since you first went on strike.

Response

Robert Allen, age 16, son. On our [*sic*] around April 1981, I gave up the custody of my son due to the expense

of supporting him. He went to live with his father at that time and continues to do so.

Interrogatory No. 12

When did you join the United Auto Workers?

Response

I joined the International Union, UAW, and UAW Local 985 in 1965.

Interrogatory No. 13

What unions other than the United Auto Workers have you been a member of, and when?

Response

None.

Interrogatory No. 14

Give the starting and ending dates of every strike you have participated in.

Response

I have been on an authorized strike against Plymouth Stamping since September 9, 1980. I have participated in a very few unauthorized strikes of no more than one or two days in length. I do not recall the dates.

I declare under penalty of law that the foregoing are true and correct.

/s/ MARY BERRY
Mary Berry, Plaintiff

Executed on: January 9, 1986

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF COLUMBIA

Civil Action No. 84-3303

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW,

AND

UNITED MINE WORKERS OF AMERICA, ET AL. PLAINTIFFS,

v.

JOHN R. BLOCK, SECRETARY, UNITED STATES DEPARTMENT OF AGRICULTURE, DEFENDANT.

Hon. Louis F. Oberdorfer

CERTIFICATE OF SERVICE

I certify that the foregoing Answers to Interrogatories were served this 9th day of January 1986, upon James A. Gardner, U. S. Department of Justice, Civil Division, Room 3706, 10th and Pennsylvania Ave., N.W., Washington, D.C. 20530, by depositing same, postage prepaid, with the U.S. Postal Service.

/s/ RICHARD W. MCHUGH
Richard W. McHugh
Attorney at Law

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

CIVIL ACTION NO. 84-3303

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, ET AL., PLAINTIFFS

v.

JOHN R. BLOCK, SECRETARY, U. S. DEPARTMENT OF AGRICULTURE, DEFENDANT

PLAINTIFF BARM COMBS' ANSWERS TO DEFENDANT'S FIRST SET OF INTERROGATORIES

INTERROGATORY NO. 1

Brush Creek Coal Company, Box 788, Prestonsburg, Kentucky, 41653.

INTERROGATORY NO. 2

I am no longer on strike.

INTERROGATORY NO. 3

(a) I returned to work on April 24, 1985, after the strike ended. The Union and company signed a new collective bargaining agreement on April 2, 1985.

(b) Charles Brush Creek Coal Company, Brush Creek No. 2, Box 778, Prestonsburg, Kentucky, 41653.

(c) Drill operator: $109.14 per shift (I was laid off on August 2, 1985, and have not worked since.)

INTERROGATORY NO. 4

Drill operater. Wage rate: $100.00 per shift.

INTERROGATORY NO. 5

During the time I participated in the strike against Brush Creek Coal Company, I received $150.00 per week and a health services card with $100.00 deductible for each dependent. I received these benefits from August 1, 1984, until late November or early December, 1984.

INTERROGATORY NO. 6

See answer to Interrogatory No. 3 above.

INTERROGATORY NO. 7

Yes.

INTERROGATORY NO. 8

I applied for stamps before I went to work at Brush Creek Coal Company, when I was unemployed due to layoffs. I was able to receive food stamps during these times. In addition, see the answer to Interrogatory No. 10 below. Approximately after one week after coming out on strike on August 1, 1984, I called the food stamp office and they advised that I was not eligible to receive food stamps due to my being on strike. In approximately the first week of September, 1984, I applied for food stamps in the Knott County office. This application was denied on September 17, 1984, because of my striker status.

INTERROGATORY NO. 9

Yes.

INTERROGATORY NO. 10

(a) My household has received food stamps many times while I was on layoff. The last time was for December, 1984, after I had abandoned the strike.

(b) For the month [*sic*] of 1984 I received approximately $300.00 of food stamps.

(c) I received these food stamps in December, 1984, from Knott County, Kentucky.

INTERROGATORY NO. 11

Patricia Combs, wife, age 39; Jeffrey Combs, son, age 15; Jimmy Ray Combs, son, age 13; Jennifer Ann Combs, daughter, age 8; Kala Lynn Combs, daughter, age 3.

INTERROGATORY NO. 12

Approximately 1971.

INTERROGATORY NO. 13

I was a member of the Steelworkers from approximately 1967 to 1968.

INTERROGATORY NO. 14

The only strike I have participated in is the strike against Brush Creek Coal Company from approximately August 1, 1984, until April 2, 1985.

AFFIDAVIT

I, Barm Combs, state that I have been read the foregoing Answers to Interrogatories and the information contained therein is true to the best of my knowledge and belief.

/s/ BARM COMBS
BARM COMBS

STATE OF KENTUCKY)
)
COUNTY OF KNOTT)

Subscribed and sworn to before me by Barm Combs this the 7th day of January, 1986.

My Commission Expires: 9-22-88

/s/ JAMES R. HAMPTON
NOTARY PUBLIC, STATE AT LARGE, KENTUCKY

Respectfully submitted,

/s/ WENDY L. KAHN
WENDY L. KAHN
ZWERDLING, PAUL, LEIBIG, KAHN & THOMPSON, P.C.
1025 CONNECTICUT AVENUE, N.W.
WASHINGTON, D.C. 20036
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Answers to Interrogatories were [*sic*] served upon the Hon. Sheila Lieber and the Hon. James A. Gardner, Attorneys, Department of Justice, Civil Division, Room 3706, 10th & Pennsylvania Avenue, N.W., Washington, D.C., 20530, by first class mail, postage prepaid, this the 10th day of January, 1986.

/s/ WENDY L KAHN
WENDY L. KAHN

Combs Deposition

[p. 8, line 1] Q32. You say, here, that your marital relationship, during the strike, was being strained by lack of money. Is that right?

A. That's correct.

Q33. Can you tell me, just generally, what kind of strain you're referring to?

A. Well, it's simple. You didn't have no money to pay the bills with. Most of the time, my wife was setting yakking and quarreling because we didn't. That's the best way I know how to explain it to you.

Q34. So, there was some arguments?

A. Yes.

Q35. Are you and your wife still together?

A. Yeah.

Q36. How did you find the job with Bob Jones?

A. The boss that I use to work with up Brush Creek, he come to my house and asked me did I want to work, which I ain't got no lies to tell. I looked for work before he come to my house.

Q37. Where did you look before he came to your house?

A. Well, I went several places. What they call Blazing Saddles and I went to several different mines—you know.

Q38. And, there was no work there?

A. No sir.

Q39. Okay. Then, this gentleman came to your house and he told you about the job with Bob Jones?

A. Yes. He asked me would I go to work there with him, so I accepted the job.

Q40. Were you working as a drill operator there, too?

A. You mean, for Bob Jones?

Q41. For Bob Jones?

A. Yes.

Q42. About how many non union mines are there that you're aware of within, say, fifty or a hundred miles from here?

A. I wouldn't have no idea.

Q43. Do you know of any others besides Bob Jones?

A. Well, there's several of them.

Q44. Can you give me some names?

A. Well, there's Muncy-Meade, and Blazing Saddles. That's about the only names that I can give you. Far as non union mines, they're plenty of them.

Q45. What was your salary at Bob Jones?

A. A hundred ($100) dollars a shift.

Q46. How long did you work at Bob Jones' mine?

A. Let's see. I started there in—. It was before Christmas in '85. I don't remember the exact day. And, I think I worked in—. No; I started in '84. I believe it was '84, before Christmas and I worked there, I believe it was up sometime in April of '85.

Q47. And, that was when the strike at Brush Creek ended?

A. That's correct.

Q48. And, you went right back to work at Brush Creek as soon as it ended?

A. Well, they called me back, I'd say, about two weeks later.

Q49. When did you first find out that you wouldn't be able to get food stamps cause you were on strike?

A. Well, the first time was about a week after I come out on strike and I called down there and I asked to speak to one of the assistants. And, they said, "you're not eligible for them". Says, "you're not eligible for them because you're on strike".

Q50. Before the strike at Brush Creek, did you know that if you went on strike you wouldn't be able to get food stamps?

A. No sir.

Q51. So, this was news to you.

A. Yeah; it was bad news to me.

Q52. Do you remember the name of the person who told you that you would be ineligible?

A. The best of my knowledge, it was the worker there they called Milburn Slone.

Q53. And, he was just an employee at the mine?

A. You mean, at the food stamp office, what you're talking about, ain't you?

Q54. Okay. You were told at the food stamp office that you were ineligible.

A. They said we was not entitled to them.

Q55. No one at the mine told you that.

A. No sir.

Q56. No one at the union told you that.

A. No sir.

Q57. Did the person at the food stamp office tell you how you might become eligible for food stamps?

A. Well, she told me—she said you—. The way she explained it to me, I'll explain it to you. She says, "you're not entitled to them because you're out on strike". She says, "if you can show one day's work, that you returned to work. . ." said, ". . . we'll give them to you". Alright, I went and got a job off of Bob Jones. I went straight back and I—I explained to her. I said, "I have to work a month before I get a payday." She said, "that's fine; I'll sign you up for this month". She signed me up and I got them.

Q58. But, you just got them for that one month December 1984?

A. I believe so.

Q59. Why didn't you get them in January?

A. Best of my knowledge, I didn't get no—which I know I never received no stamps until I went to work for Bob Jones. And, I can't remember the exact date I went to work for Bob Jones.

Q60. Did you—? Well, that's what I'm asking. Did you apply to get food stamps for the month of January, 1985?

A. I applied—. Let's see. I believe it was—. I applied for three different times before I went to work for Bob Jones.

Q61. Well, what I'm trying to figure out is, why you got them in December and then you didn't keep on getting them. Do you have any idea?

A. Well, it's simple. You can't get stamps and work.

Q62. Did somebody at the food stamp office tell you that you were making too much money?

A. Well, they ain't nobody has to tell you that. Common sense will tell you that. You can't get stamps and work. That's the best way I know how to explain it.

Q63. When you told the person in the food stamp office that you had gotten this job with Bob Jones, did you tell how much you were making there?

A. That's correct.

Q64. Now, you say that once you started working again, you were able to get a loan. Is that right?

A. That's correct.

Q65. Would you have been able to get that loan if you had been working at a union mine?

A. Yes; you could get a loan if you're working but you cannot get a loan if you ain't working.

Q66. No one at the loan office asked you whether you were working at a union or a non union mine, did they?

A. No sir.

Q67. Now, you mention, here, that when you went to rejoin the UMWA, it cost you two hundred ($200) dollars. Is that right?

A. That's correct.

Q68. Where did you find the two hundred ($200) dollars to pay that initial fee?

A. They cut it out of each check. I think they cut it once a month, fifty ($50) dollars.

Q69. For four months?

A. Yeah.

Q70. You mention, here, that the financial strain on the bargaining unit members caused dissension between the bargaining unit members and the International Union. What kind of dissension are you referring to there?

A. Well, we just discuss it between the men—you know—and we thought we ought to—. We asked them was they any way they could help get them more money. We's having—you know—we couldn't survive.

Q71. So, the members of the bargaining unit complained to the International.

A. Well, it was just mostly the men complaining—you know.

Q72. And, the—did the International not do anything about it?

A. Well, I'll state it this way, we never did get no help. And, after I went back to work at the non union, I think they finally got up to two hundred ($200) dollars.

DYER DEPOSITION

[p. 4, line 22] Q18. The strike began in August of 1984. Is that right?

A. Yeah.

Q19. Why did you wait until September before you applied for food stamps?

A. Well, see, before I got started to work over there, I drawed food stamps and I just got to work twelve days and then they come out on the strike.

Q20. I'm not sure I understood your answer. Let me see if we can take it step by step. The strike began in August of 1984.

A. Yeah.

Q21. And, at that time, you went out on strike.

A. Yeah.

Q22. And, you weren't working at that time, right?

A. No; not while we's out on strike, I wouldn't working.

Q23. Did you have —? Did you hold down any job between August—well, in the month of August?

A. Huh uh [indicates, no].

Q24. Did you hold down a job in the month of September?

A. No; I didn't get to work none except on the picket line—you know—when we—after we come out on strike and then I stayed on it.

Q25. And, you waited for just about a whole month, from the beginning of August to the beginning of September, before you applied for the food stamps.

A. No. When we—. When we first come out on the strike, it was a week after that we come out on strike that I went and signed up on the food stamps.

Q26. I see. So, you applied for food stamps in the first or second week of August?

A. Yeah, I guess; the best of my knowledge.

Q27. Did you know that you would not be able to get food stamps because you were out on strike, when you applied?

A. No. I thought that was what it was there for, for somebody not working.

Q28. So, first you heard that strikers couldn't get stamps was when you were denied?

A. Yeah. When I went in the office down there and—to reply for them, that woman told me that I couldn't—wouldn't eligible for them because I was out on strike. And, then, week after that, I guess, they sent me some kind of paper and told me I wouldn't eligible for them.

Q29. Did the person you spoke to in the food stamp office tell you how you could become eligible?

A. Yeah.

Q30. What'd she say?

A. She said if I worked one day and—somewheres else and come in and showed that I'd been working that I'd been eligible to get them.

Q31. Did you look for other work?

A. No.

Q32. Do you know anyone who looked for other work?

A. Yeah; my brother-in-law, Barm Combs. He had—had to quit the union and go scabbing before he could get any work.

Q33. Do you know of anyone else?

A. No.

Q34. You say, here, that your wife and children left you in December of 1984.

A. Yeah.

Q35. Can you tell me why?

A. Ah, not really. It's a—. We just been in a hard place and couldn't afford to keep them up. I'll put it straight to you. That's all I can say. Just drawing a hundred

fifty ($150) dollars. And, you take four youngins' or five, we just got in a hard place and she said, "Well, I'm leaving you", if I didn't go work somewheres else and she just left me.

Q36. Are you and your wife divorced?

A. Yeah.

Q37. Were you divorced by a Court or a Judge?

A. Yeah. I don't—. I don't remember his name, though.

Q38. Are there any—? Do you happen to know, are there any papers or records of that?

A. No. It—it ain't final yet, though, the divorce ain't. But, all I have to do is pay it off, and I ain't got the money to pay it off.

Q39. After your wife left you, where did she go?

A. I believe she went to Caney and went—. She lives in a housing project of some kind over there.

Q40. Who made the original application for food stamps? Was it you, or was it your wife?

A. Oh, when we first went to sign up on it, they filled them out down there, cause I—. Where I couldn't read and stuff, I told them I couldn't read and they filled them out down there for me—you know—after I went in and applied for them.

Q41. You went in, in person.

A. Yeah.

Q42. Do you happen to know if after your wife moved out, she reapplied, or she applied on her own, for food stamps?

A. Yeah; she applied on her own.

Q43. Do you know when she did that?

A. No. I don't remember it; I don't know the date. [p. 13, line 22] Q.82. Did you have any problem rejoining the United Mine Workers? when you came back to them?

A. No; I just had a hard time getting a job back—you know—for them.

[p. 14, line 9] A. [continued] I didn't have no—you know—what you call a time getting a job. It's just hard to find a job in the union mines.

Q83. Was it held against you that you had quit the union years before?

A. No sir.

Q84. Do you know of anyone who did receive food stamps during the strike?

A. I believe my brother-in-law received them but he quit. He had to quit the union mine before he could get them.

Q85. You're speaking of Mr. Combs?

A. Yeah; Barm Combs.

Q86. Do you know of anyone besides him?

A. No sir.

[p. 20, line 12] Q130. Did you apply for any other government benefits besides food stamps?

A. No sir.

Q131. Why was it that you applied for the food stamps?

A. Cause I needed them to buy my dinner with; to keep from starving.

Q132. Before the strike, while you were working at Brush Creek, did you ever look around for another job?

A. No. sir.

Q133. Did you ever think about it?

A. Huh uh [indicates, no].

Q134. Did you ever know anyone to—any member of the union to return to work during the strike?

A. No sir.

Q135. Have you ever heard of anybody doing that?

A. Huh uh [indicates, no].

Q136. Do you know of anyone who ever thought about doing it? that they told you?

A. Do you mean to cross a picket line?

Q137. Yes sir.

A. No sir.

Q138. Did you ever think about it?

A. Huh uh [indicates, no].

Q139. Would you ever do anything like that?

A. No sir.

Q140. Did you ever know any incident of violence to occur on a picket line?

A. No.

Q141. Did you know that if you returned to work, during the strike, that that would've made you eligible for food stamps?

A. If I—? Repeat that.

Q142. Sure. Do you know that if you had crossed the picket line and gone back to work that you would have then been eligible for food stamps? Did you know that?

A. No.

Q143. You said that while you were out on strike you didn't look for any other jobs. Is that right?

A. No sir.

Q144. Not even other union jobs?

A. Huh uh [indicates, no].

Q145. Did everyone always show up for picket duty?

A. Yes sir. Where I worked—you know—where I stood, about everybody showed up every day.

Q146. Did you ever hear the people who were on strike talking about food stamps?

A. Yeah.

Q147. What did they—? What were they talking about?

A. They said if we could've got the food stamps, it would've helped us a whole lot but they ain't no way. It would've helped us a whole lot in the long run.

Q148. How would it have helped you?

A. Well, we could've paid our bills. Took our strike money and paid our bills with it and we wouldn't have been so hard up for something to eat.

Q149. Would the strike benefits, plus the food stamps tacked together been as much as you would be earning if you were at work at the mine?

A. No; not hardly.

Q150. You would have still been hard up, even with the food stamps, wouldn't you?

A. No; not really. Not really that hard up. If I could've got the food stamps, see, I could have paid my electric bills and stuff with the money.

In the Supreme Court of the United States

No. 86-1471

RICHARD A. LYNG, SECRETARY OF AGRICULTURE, APPELLANT

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, ET AL.

Appeal from the United States District Court for the District of Columbia.

The statement of jurisdiction in this case having been submitted and considered by the Court, in this case probable jurisdiction is noted.

May 4, 1987

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APPELLANT'S

BRIEF

No. 86-1471

(5)

FILED

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In the Supreme Court of the United States

OCTOBER TERM, 1986

RICHARD A. LYNG, SECRETARY OF AGRICULTURE,
APPELLANT

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS
OF AMERICA, UAW, ET AL.

---

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA*

BRIEF FOR THE APPELLANT

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QUESTION PRESENTED

Section 6(d)(3) of the Food Stamp Act, 7 U.S.C. 2015(d)(3), generally provides that a household shall not become eligible to participate in the food stamp program at any time that a member of the household is on strike. The statute further provides that a household already participating in the program shall not receive an increased allotment of food stamps by reason of the loss of income occasioned when a member of the household goes on strike. The question presented is whether this statute is unconstitutional as violative of the First Amendment, the Due Process Clause or the Equal Protection component of the Fifth Amendment.

PARTIES TO THE PROCEEDING

In addition to those named in the caption, the parties are: United Mine Workers of America (UMWA); Mary Berry; Johnie B. Blake; Barm Combs; Patricia Ann Combs; Mark Dyer; Geneva Dyer; and a class of persons composed of certain UAW and UMWA strikers and their households.

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*ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA*

BRIEF FOR THE APPELLANT

OPINIONS BELOW

The memorandum of the district court holding the relevant provision of the Food Stamp Act unconstitutional (J.S. App. 1a-16a) is reported at 648 F. Supp. 1234, and its accompanying order (J.S. App. 71a-72a) is unreported. An earlier decision of the district court (J.S. App. 17a-47a) is reported at 648 F. Supp. 1241. Subsequent decisions and orders of the district court (J.S. App. 48a-65a, 66a-70a) are reported at 651 F. Supp, 855.

JURISDICTION

The order of the district court declaring the statute unconstitutional (J.S. App. 71a-72a) was entered on November 14, 1986. The order of the district court enjoining the Secretary from enforcing the statute (J.S. App. 48a-50a) was entered on December 22, 1986. A notice of appeal to this Court (J.S. App. 73a) was filed on Decem-

ber 11, 1986, and an amended notice of appeal (J.S. App. 74a) was filed on December 30, 1986. On February 2, 1987, the Chief Justice extended the time within which to docket this appeal to and including March 12, 1987. The jurisdictional statement was filed on that date, and probable jurisdiction was noted on May 4, 1987. The jurisdiction of this Court rests on 28 U.S.C. 1252.

STATUTORY PROVISION INVOLVED

7 U.S.C. 2015(d)(3) provides:

> Notwithstanding any other provision of law, a household shall not participate in the food stamp program at any time that any member of such household, not exempt from the work registration requirements of paragraph (1) of this subsection, is on strike as defined in section 142(2) of title 29, because of a labor dispute (other than a lockout) as defined in section 152(9) of title 29: *Provided*, That a household shall not lose its eligibility to participate in the food stamp program as a result of one of its members going on strike if the household was eligible for food stamps immediately prior to such strike, however, such household shall not receive an increased allotment as the result of a decrease in the income of the striking member or members of the household: *Provided further*, That such ineligibility shall not apply to any household that does not contain a member on strike, if any of its members refuses to accept employment at a plant or site because of a strike or lockout.

STATEMENT

The Food Stamp Act of 1964, 7 U.S.C. (& Supp. III) 2011 *et seq.*, established a public welfare program, funded by the Department of Agriculture and administered by state agencies, that supplements the food purchasing

power of low-income households. This suit was brought by a number of potential food-stamp recipients and certain labor unions against the Secretary of Agriculture (the Secretary), challenging the constitutionality of Section 6(d)(3) of the Act, 7 U.S.C. 2015(d)(3). That Section generally provides that a household may not become eligible for food stamps—or, if already eligible, may not receive an increased allotment of food stamps—by reason of a decrease in household income occasioned by the fact that any member of the household is on strike.

The United States District Court for the District of Columbia held that Section 2015(d)(3) is unconstitutional and enjoined its enforcement. The court held that the statute violates the First Amendment rights of strikers to associate with their families and with other union members. The court also held that Section 2015(d)(3) violates equal protection principles by creating a classification that discriminates against striking employees.

A. The Food Stamp Program

1. The Food Stamp program is a federally-funded, state-administered effort to "permit low-income households to obtain a more nutritious diet through normal channels of trade by increasing food purchasing power." 7 U.S.C. 2011. Participating households receive coupons (food stamps) that can be used for food purchases at retail stores. 7 U.S.C. (Supp. III) 2013. Over the years, the Food Stamp program has become the Nation's second most costly "needs-based" public assistance program. See S. Rep. 97-128, 97th Cong., 1st Sess. 2 (1981). Program outlays were in excess of $10 billion in 1985, providing assistance to nearly 20 million participants. See Bureau of the Census, U.S. Dep't of Commerce, *Statistical Abstract of the United States 1987*, at 112. The program has grown dramatically since its inception, registering

a 20-fold increase in outlays and a three-fold increase in participation since 1970.[1]

To contain the Food Stamp program within financially practicable limits, and to ensure that funds are channeled to those who are most in need of assistance, the Act prescribes a number of eligibility requirements. First, the Act imposes an income threshold for the receipt of benefits. Food stamps are provided only to households with aggregate income and financial resources below certain specified national standards. 7 U.S.C. (& Supp. III) 2014. The Act also establishes various non-financial criteria. For example, 7 U.S.C. (Supp. III) 2015(d)(1) withholds food stamps from households in which the head of the household refuses to register for employment, refuses to participate in an employment and training program, or refuses to accept employment at a wage not less than the specified minimum. 7 U.S.C. (& Supp. III) 2015(d)(1)(A)(i), (ii) and (iii). Section 2015(d)(1)(B)(ii) makes ineligible for 90 days a household whose head voluntarily quits a job without good cause. And 7 U.S.C. (& Supp. III) 2029 permits the states to disqualify certain households whose members refuse to participate in "workfare programs." See also 7 U.S.C. 2015(b) (disqualification for engaging in fraud and misrepresentation about food-stamp eligibility).

2. Consistent with its policy of ensuring that limited federal funds remain available to assist the neediest house-

[1] Bureau of the Census, U.S. Dep't of Commerce, *Statistical Abstract of the United States 1985*, at 123. In 1965, approximately 633,000 persons participated in the Food Stamp program, representing a federal outlay of $33 million (*ibid.*). By 1970, participation had grown to nearly 6.5 million persons, representing a federal outlay of $550 million (*ibid.*). In 1975, nearly 20 million persons participated, representing a federal outlay of over $4.3 billion (*ibid.*).

holds, Congress has repeatedly considered, and several times enacted, measures designed to restrict the availability of food stamps to households with members who are on strike. Four years after the Food Stamp Act was passed, the House of Representatives in 1968 adopted an amendment to the Act that would have made persons engaged in a labor dispute ineligible for food stamps unless those persons had been eligible for and were receiving food stamps before the labor dispute began. See H.R. Rep. 1619, 90th Cong., 2d Sess. 4 (1968). In reporting its version of the amendment, the House Agricultural Committee explained (*id.* at 2):

> In view of the original intent and purposes of the food stamp program, the acute need to stretch the funds of Government to reach as many of the needy as possible and the adequacy of other resources, public and private, to help * * * participants in industrial disagreements, the committee voted to prohibit the use of stamps * * * to support industrial disputes[.]

Although this amendment passed the House,[2] it was eventually deleted in conference. See H.R. Rep. 1908, 90th

[2] Supporters of the amendment stated that its purpose was "to keep the [Food Stamp] program as close as possible to the original intent of the Congress in establishing it as a means of reaching the involuntarily poor" (114 Cong. Rec. 23946 (1968) (Rep. May)). Representative May observed that "[i]t would be possible, of course, to devise a food stamp program to reduce the cost of food to all Americans, but the expense of such a program would be astronomical, and certainly there is no justification for using public funds to reduce the cost of food to those who are capable of earning enough to buy it" (*ibid.*). "The question," she explained, "becomes one of where to draw the line," and Representative May concluded that the Committee amendment correctly limited the availability of food stamps to "those who are involuntarily poor" (*ibid.*). See also *id.* at 24237 (Rep. Teague). Supporters also endorsed the amendment as a way to ensure that "the Federal Government and the taxpayers [not] * * * be involved in the

Cong., 2d Sess. 2 (1968); 114 Cong. Rec. 28002 (1968) (Rep. Poage). Similar amendments were again proposed and debated in 1970, 1971, and 1972.[3]

In 1973, the House once more adopted an amendment to the Food Stamp Act limiting the eligibility of striking employees and their families. The bill provided that "a household shall not participate in the food stamp program while its principal wage-earner is * * * on strike: *Provided*, That such ineligibility shall not apply to any household that was eligible for and participating in the

collective bargaining process on either side[]" (*id.* at 24231 (Rep. Edwards)). In their view, "permit[ting] strikers to participate in the food stamp program * * * [would] upset[] th[e] delicate balance between labor and management when a strike is resorted to as an economic weapon in the collective bargaining process[]" (*id.* at 24232 (Rep. Michel)).

[3] See H.R. Rep. 91-1402, 91st Cong., 2d Sess. 11 (1970); 117 Cong. Rec. 21671-21676 (1971). In 1972, the House proposed legislation providing that no funds appropriated for the Food Stamp Act could be used "to make food stamps available for the duration of a strike to a household which needs assistance solely because any member of such household is a participant in such strike" (118 Cong. Rec. 23364 (1972) (Rep. Michel)). Representative Michel, the sponsor of the bill (see *id.* at 22462 (Rep. Anderson)), explained that "[f]ood stamps were intended to assist the unfortunate families whose breadwinners have been unwillingly unemployed. It is not bargaining legislation and we have no right to use food stamps for this purpose. * * * * * To provide food stamps to strikers increases the union's ability to 'hold out' and by doing this, Government automatically places business at a disadvantage in the negotiating process" (*id.* at 23366). Representative Michel also contended (*id.* at 23367) that union strike funds should be relied on to support striking employees and their households. See also *id.* at 23367-23368 (Rep. Abbitt); *id.* at 23368 (Rep. Pelly); *id.* at 23368-23369 (Rep. Teague); *id.* at 23370-23371 (Rep. Anderson); *id.* at 23373-23374 (Rep. Crane); *id.* at 23375 (Rep. Winn); *ibid.* (Rep. Fisher); *id.* at 23375-23376 (Rep. Quie); *id.* at 23376-23377 (Rep. Blackburn); *id.* at 23377 (Rep. Lloyd); *ibid.* (Rep. Skubitz); *id.* at 23377-23378 (Rep. Conover). By a vote of 199 to 180, the bill was defeated on the House floor (*id.* at 23378).

food stamp program immediately prior to the start of such strike * * *." See H.R. Rep. 95-464, 95th Cong., 1st Sess. 125-126 (1977); 119 Cong. Rec. 24928 (1973) (Rep. Dickinson).[4] After the Conference Committee was unable to reconcile a disagreement between the House and the Senate, the amendment was eliminated. See H.R. Rep. 93-427, 93d Cong., 1st Sess. 2, 40 (1973).[5] A nearly iden-

[4] Representative Dickinson, the sponsor of the legislation, stressed that it was "not an anti-organized labor amendment, but rather it is a pro-poor-people amendment. Every dollar that is taken away from those who are in need to help subsidize someone on strike, who is not in need, to that extent it is a perversion of the intent of the original passage of the law." 119 Cong. Rec. 24928 (1973). Supporters also stated that federal funds should not be used to assist only one side of a labor dispute (see, *e.g.*, *ibid.* (Rep. Dickinson); *id.* at 24929 (Rep. Young); *id.* at 24939 (Rep. Burke)), and contended that union strike funds were the appropriate sources of assistance (see, *e.g.*, *id.* at 24929 (Rep. Young); *id.* at 24932 (Rep. Rousselot); *ibid.* (Rep. Teague); *id.* at 24937 (Rep. Michel); *id.* at 24939 (Rep. Burke)). Other members observed that the proposed limitation was consistent with the policy that "[a]n able-bodied man who elects to stop working * * * should not be * * * encouraged in his actions by the Federal Government" (*id.* at 24929 (Rep. Young); see also *id.* at 24938 (Rep. Henderson)).

[5] Although the Conferees could not agree on the House proposal, they made clear their intent that persons unemployed by strikes, like persons unemployed for other reasons, had to satisfy the work-registration requirements of 7 U.S.C. (Supp. III) 2015(d)(1) in order for their households to qualify for food stamps. The Conferees stated (H.R. Rep. 93-427, *supra*, at 40) that they

> deplore the lack of enforcement of existing food stamp regulations which require that an able-bodied person in the household register for employment "including a person who is not working because of a strike or lockout at his usual place of employment." It is the specific intent of the Conferees that this provision of the regulations be rigidly and uniformly enforced by the Department of Agriculture * * *. Eligibility of strikers for food stamps should be carefully scrutinized prior to certification and certification made only in those cases where the household of the individual striker applicant meets all of the requirements of eligibility as in the case of other applicants.

tical bill was unsuccessfully proposed in 1974 (see 120 Cong. Rec. 20613-20616), and again in 1977 (see H.R. Rep. 95-464, 95th Cong., 1st Sess. 129-130 (1977)).

In 1979 Congress enacted an amendment to the Food Stamp Act providing that "[n]o household that contains a person involved in a labor-management dispute shall be eligible to participate in the food stamp program unless the household meets the income guidelines, asset requirements, and work registration requirements of this Act." Pub. L. No. 96-58, § 9, 93 Stat. 392, 7 U.S.C. (Supp. III 1979) 2015(i). The purpose of the legislation was "to stop the practice of * * * issuing food stamps to strikers on a helter-skelter basis" (125 Cong. Rec. 20199-20200 (1979) (Sen. Helms)). Instead, Congress aimed to make clear that strikers "would have to meet identical eligibility rules" as other food stamp applicants. H.R. Rep. 96-788, 96th Cong., 2d Sess. 131 (1980). See S. Rep. 96-261, 96th Cong., 1st Sess. 11 (1979); 125 Cong. Rec. 20199 (1979).

The following year, Congress "reiterate[d] its intention that the food stamp program be limited to the truly needy" by adding an amendment to the Act "that makes crystal clear that it does not countenance making any striker or the striker's household eligible for food stamps by virtue solely of the existence of the strike" (H.R. Rep. 96-788, *supra*, at 131). The amendment set forth a general rule that households containing strikers were to be ineligible for food stamps, subject to the proviso that "such ineligibility shall not apply if the household meets the income qualifications, assets requirements, and work registration requirements, as mandated in [the Act]." Pub. L. No. 96-249, § 114, 94 Stat. 361, 7 U.S.C. (Supp. IV 1980) 2015(d)(4). See H.R. Rep. 96-957, 96th Cong., 2d Sess. 6, 21-22 (1980).[6]

[6] At the same time, Congress rejected a proposal to "automatically and unequivocally disqualify[] any and all strikers from participation in the food stamp program" because it concluded that such an absolute bar would unduly pressure the employee and his family to abandon the strike. H.R. Rep. 96-788, *supra*, at 132-133.

3. In 1981 Congress enacted the amendment challenged in this case. Omnibus Budget Reconciliation Act of 1981 (OBRA), Pub. L. No. 97-35, § 109, 95 Stat. 361. Now codified at 7 U.S.C. 2015(d)(3),[7] the amendment generally provides that "a household shall not participate in the food stamp program at any time that any [otherwise-qualified] member of such household * * * is on strike." A proviso states that a household already eligible for food stamps shall not lose its eligibility if one of its members goes on strike, but that "such household shall not receive an increased allotment as the result of a decrease in the income of [its] striking member or members."

The 1981 amendment was designed to promote three distinct goals. The first and foremost of these goals was a reduction in the cost of the Food Stamp program. Section 2015(d)(3), as amended, was part of a package of across-the-board budget cuts whose purpose was to effect "dramatic changes in Federal spending policy * * * necessary in order to wage an effective battle against the high inflation and unemployment which have plagued the national economy for many years." S. Rep. 97-139, 97th Cong., 1st Sess. 3 (1981). Cf. *Heckler* v. *Turner*, 470 U.S. 184, 205 (1985). Indeed, the 1981 amendment to Section 2015(d)(3) was only one of many changes in the Food Stamp Act enacted by OBRA in an effort to achieve significant budgetary savings. See, *e.g.*, Pub. L. No. 97-35, § 101, 95 Stat. 358, 7 U.S.C. 2012(i) (providing that

[7] The 1981 amendment was accomplished by deleting the third proviso from the 1980 version of Section 2015(d)(4) and by making certain ancillary changes. See 7 U.S.C. (Supp. V 1981) 2015(d)(4). Section 2015(d)(4) was redesignated as Section 2015(d)(3) by the Omnibus Budget Reconciliation Act of 1982, Pub. L. No. 97-253, § 190(b), 96 Stat. 787.

parents and children who live together shall comprise a single household for food stamp purposes); Pub. L. No. 97-35, § 104(a), 95 Stat. 358, 7 U.S.C. 2014(c)(2) (establishing new gross income eligibility standard for the Food Stamp program). See generally S. Rep. 97-139, *supra*, at 52-53, 55-57. All told, supporters anticipated that these "substantial reforms in the food stamp program * * * [would] pare its burgeoning cost by nearly $2.5 billion in fiscal year 1984, with slightly smaller savings in fiscal year 1982 and fiscal year 1983" (127 Cong. Rec. 13919 (1981) (Sen. Thurmond)). Accord, *id.* at 13930 (Sen. Huddleston). And the amendment now codified in Section 2015(d)(3) was itself expected to yield savings of approximately $165 million over the three-year period from 1982 to 1984. S. Rep. 97-139, *supra*, at 63. See also *id.* at 119 (detailing administrative savings expected to result from the amendment).

Secondly, by significantly restricting the availability of food stamps to households that included strikers, Congress sought to promote "the underlying policy of tying receipt of food stamps to the ability and willingness to work, as exemplified by provisions requiring work registration, denying benefits to those voluntarily quitting a job without good cause, and allowing the establishment of workfare programs." S. Rep. 97-139, *supra*, at 62. Congress determined that a person who goes on strike, unlike needy persons without job opportunities, "has given up the income from the job of his own volition" (*ibid.*). And Congress concluded that "[u]nion strike funds should be responsible for providing support and benefits to strikers during labor-management disputes" (*ibid.*).

Finally, Congress reiterated the view—repeatedly expressed during congressional consideration of the many precursors of the bill—that the 1981 amendment would help promote government neutrality in labor disputes.

According to the Senate Report, providing food stamps to striking workers could "be seen as encouragement to workers to 'wait out' management, rather than compromise." S. Rep. 97-139, *supra*, at 62. Congress was particularly concerned about strikes by public employees, who under previous law might receive food stamps "even though the strikes in which they [were] participating [were] illegal" (*ibid.*).

B. The Present Controversy

Appellees are two labor unions and several individual union members. On October 29, 1984, they filed this action in the United States District Court for the District of Columbia, challenging the constitutionality of Section 2015(d)(3) and seeking declaratory and injunctive relief. On September 30, 1985, the district court denied the Secretary's motion to dismiss the complaint (J.S. App. 17a-47a). The parties thereafter conducted discovery and filed cross-motions for summary judgment.

On November 14, 1986, the court granted appellees' motion for summary judgment and issued a declaratory judgment (J.S. App. 1a-16a, 71a-72a). The district court acknowledged that Section 2015(d)(3) "is, in one sense, rationally related to legitimate legislative objectives—requiring a person able to work to do so in order to receive food stamps and promoting government neutrality in strikes" (J.S. App. 10a). Nevertheless, identifying five deficiencies in the statute, the court held it unconstitutional.

First, the court found that the statute "interferes or threatens to interfere with the First Amendment right of the individual plaintiffs to associate with their families, with their union, and with fellow union members, as well as the reciprocal First Amendment right of each union plaintiff to its members' association with the union" (J.S. App. 11a (citations omitted)). Second, relying on this Court's decisions in *Abood* v. *Detroit Bd. of Education*, 431 U.S. 209

(1977), and *Sherbert* v. *Verner*, 374 U.S. 398 (1963), the court determined that "[t]he statute as administered interferes with strikers' right to express themselves about union matters free of coercion by the government" (J.S. App. 11a). Third, the court stated that strikers as a group have historically " 'been subject to discrimination,' " possess " 'obvious and distinguishing characteristics,' " and have "frequently been in the stance of an unpopular political minority" (J.S. App. 12a (citations omitted)). The court accordingly suggested that strikers should be considered a suspect or quasi-suspect class for equal-protection purposes. Fourth, the court discerned in the statute (*id.* at 13a) "significant and discriminatory differences between the treatment accorded a striker who stops work in concert with others and an individual who quits a job." As a result, the court stated that one of the rationales advanced by Congress for Section 2015(d)(3)—the desire to tie the receipt of food stamps to the willingness to work—was "seriously weakened" (J.S. App. 13a).

Finally, in an analysis that the court termed "critical to [its] appraisal of rationality," the court stated that Section 2015(d)(3) "impermissibly strikes at the striker through his family" (J.S. App. 13a). In the district court's view, "[n]either administrative convenience nor the desirability of maintaining government neutrality in labor disputes justifies the denial of food stamps to innocent members of a striker's household if this legislative purpose could be achieved by more narrowly tailored measures." The court surmised that "[a]djusting the food stamp allotment to exclude the striker would be neither difficult nor intrusive" (*id.* at 14a). It accordingly held that the statute, "when considered in light of its impact on the constitutional rights of the plaintiffs and on innocent members of the families of the individual plaintiffs, is not sufficiently

tailored to the objectives stated by its defenders to pass constitutional muster" (*id.* at 15a). The court issued an order granting a declaratory judgment consistent with this decision (*id.* at 71a-72a).

On December 22, 1986, the district court granted appellees interim injunctive relief (J.S. App. 48a-50a). In relevant part, the court enjoined the Secretary (*id.* at 48a-49a) "pending further orders of this Court or the Supreme Court, from enforcing the provisions of 7 U.S.C. § 2015(d)(3) and its implementing regulations to disqualify class members from participation in the Food Stamp program when they are determined by a state or local Food Stamp agency to meet the other eligibility requirements of the Food Stamp Act."[8]

SUMMARY OF ARGUMENT

The district court has held unconstitutional a carefully considered provision of the Food Stamp Act, whose evident purpose is to allocate finite resources to those most in need of government assistance. Applying a loose amalgam of heightened and rational-basis scrutiny, the district court held that Section 2015(d)(3) impinges on fundamental rights of free speech and association, burdens a suspect class, and irrationally discriminates against striking workers. The court's analysis is flawed at every turn. It ignores settled equal protection principles and improperly second-guesses the complex choices made by Congress when it amended the Food Stamp Act. The result cannot be reconciled with this Court's decisions and reflects a marked lack of deference to "the duly enacted and care-

[8] On the same day, the district court also granted class certification (J.S. App. 66a-70a) and ordered the union appellees to furnish a bond in an amount sufficient to cover the Secretary's costs of food stamps provided under the injunction pending appeal (*id.* at 50a).

fully considered decision of a coequal and representative branch of our Government." *Walters* v. *Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 319 (1985).

Congress amended Section 2015(d)(3) as part of a broader legislative effort to reduce the federal deficit and to channel scarce resources to persons whom Congress believed to be most in need of assistance. At the same time, Congress chose to remove itself from labor disputes by withdrawing benefits that it thought were more appropriately provided by union strike funds. These choices, whatever their wisdom, are plainly rational and easily survive scrutiny under the equal protection component of the Due Process Clause.

Recognizing explicitly that Section 2015(d)(3), as amended, is "rationally related to legitimate legislative objectives" (J.S. App. 10a), the district court applied a more exacting analysis and found the statute to fail a variety of doctrinal tests. But the real failure, we submit, lies in the court's tests, and not in the statute. Section 2015(d)(3) infringes no rights of association, since nothing in the statute prevents employees from exercising those rights. The court likewise erred in finding an abridgment of freedom of expression, since Section 2015(d)(3) does not abridge speech but merely declines to underwrite it. There was, moreover, no warrant for the court's suggestion that strikers are a suspect class deserving of greater constitutional solicitude; indeed, the evidence marshalled by the court for that surprising proposition compels precisely the opposite conclusion. Finally, the court's "critical" concern (J.S. App. 13a)—that Section 2015(d)(3) "impermissibly strikes at the striker through his family"—misapprehends the nature of the Food Stamp Act, which provides benefits to "households" that otherwise meet the requirements of the statute.

ARGUMENT

THE CHALLENGED PROVISION OF THE FOOD STAMP ACT IS CONSTITUTIONAL

A. Congress Acted Rationally In Declining To Extend Food Stamps To Households Based On Income Lost During A Strike

Equal protection principles generally require that legislation accord like treatment to similarly situated individuals. See, *e.g.*, *City of Cleburne* v. *Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985); *Plyler* v. *Doe*, 457 U.S. 202, 216 (1982). But the precept of equal protection only requires that the distinctions made by legislators be rational. "A legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the [government] to remedy every ill." *Plyler* v. *Doe*, 457 U.S. at 216. Particularly in cases involving social welfare programs—where Congress must "make many distinctions among classes of beneficiaries while making allocations from a finite fund" (*Bowen* v. *Owens*, No. 84-1905 (May 19, 1986), slip op. 5)—the judiciary must give broad deference to the choices of Congress, "the appropriate representative body through which the public makes democratic choices among alternative solutions to social and economic problems." *Schweiker* v. *Wilson*, 450 U.S. 221, 230 (1981). In the end, courts "seek only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose." *Plyler* v. *Doe*, 457 U.S. at 216.[9]

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[9] See also *Schweiker* v. *Hogan*, 457 U.S. 569, 588-593 (1982) (rejecting an equal protection challenge to federal limitations that result in higher Medicaid benefits to recipients of Supplemental Security Income (SSI) than to persons who are self-supporting); *Schweiker* v. *Wilson*, 450 U.S. at 230-239 (rejecting an equal protection challenge to a federal limitation on SSI eligibility that provides benefits only to

These principles confirm that Congress did not violate equal protection when it amended Section 2015(d)(3). By 1981 Congress recognized that the Nation faced budget deficits of commanding proportions. In its *Report on the January 1981 Economic Report of the President,* the Democratic members of Congress recommended that "[f]ederal spending * * * be reduced promptly" and concluded that "[n]o government spending program should be exempt from scrutiny." H.R. Rep. 97-5, 97th Cong., 1st Sess. 25 (1981). The Republicans took the same view, endorsing the President's "proposed * * * array of spending cuts" even though concededly "some program cuts will hurt some people" (*id.* at 102). The 1981 amendments to the Food Stamp Act must therefore be understood, first and foremost, as part of a much broader economic strategy, intended to bring inflation to a halt and to reduce dramatically the growth of federal spending.[10]

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residents in public institutions who receive Medicaid funds for their care); *Califano* v. *Aznavorian,* 439 U.S. 170, 174-178 (1978) (rejecting an equal protection challenge to federal limitations on payment of SSI benefits to persons who reside outside the United States for a period of greater than 30 days); *Mathews* v. *De Castro,* 429 U.S. 181 (1976) (rejecting an equal protection challenge to a federal limitation on payment of Social Security benefits to the divorced wives of retirees); *Mathews* v. *Lucas,* 427 U.S. 495, 503-516 (1976) (rejecting an equal protection challenge to a federal limitation on payment of Social Security benefits to surviving illegitimate children who are unable to establish dependency on the putative parent).

[10] In accordance with this broader strategy, in February 1981 the President submitted to Congress an economic program calling for a "comprehensive reduction in the rapid growth of Federal spending." The President proposed "a careful set of guidelines" to identify "programs in virtually every department and agency that can be eliminated, reduced, or postponed." *Program For Economic Recovery,* H.R. Doc. 97-21, 97th Cong., 1st Sess. 24 (1981). The plan, largely enacted by the OBRA legislation, reflected the belief that "[t]he uncontrolled growth of government spending has been a primary cause of the sustained high rate of inflation experienced by

Faced with that overwhelming budget deficit (see *Economic Report of the President,* H.R. Doc. 97-3, 97th Cong., 1st Sess. 9 (1981)), and with ever-increasing demands on federal resources, Congress decided to "concentrate limited funds where the need [was] likely to be greatest." *Califano* v. *Boles,* 443 U.S. 282, 296 (1979); accord, *Bowen* v. *Owens,* slip op. 8. It concluded, quite reasonably, that households whose members are on strike have greater access to the means of self-support than households whose members are entirely without employment opportunities. By making such necessarily close distinctions, Congress determined that it could conserve as much as $165 million over the three-year period from 1982 to 1984. S. Rep. 97-139, *supra,* at 63. And by doing so, Congress believed that it could channel scarce resources to persons who were "genuinely in need" (119 Cong. Rec. 24929 (1973) (Rep. Young)). That choice—a culmination of 13 years of debate and congressional consideration of comparable legislation (see pages 4-8, *supra*)—is plainly rational.

Congress in amending Section 2015(d)(3) was also animated by a desire to achieve a greater measure of neutrality in labor disputes. Again, there is nothing irrational about that course of action. In *Ohio Bureau of Employment Services* v. *Hodory,* 431 U.S. 471 (1977), this Court expressly recognized that the government acts rationally when it seeks to remain neutral in labor disputes. At issue in *Hodory* was a state statute that denied unemployment compensation to employees who were out of work as the result of a labor dispute other than a lockout. Appellee, who was furloughed when the plant at

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the American economy" (*id.* at 32). One (but only one) part of this plan envisioned restoring "[t]he Food Stamp program * * * to its original purpose, to assist those without resources to purchase sufficient nutritional food" (*id.* at 3).

which he worked was shut down because of a strike at the company's coal mines, contended that the statute denying him unemployment compensation was irrational. This Court disagreed. Noting that under the state system the employer was obligated to make contributions to the state's unemployment compensation fund, the Court observed (*id.* at 492) that as a result "[t]he employer's costs go up with every laid-off worker who is qualified to collect unemployment." The Court held that the state was constitutionally entitled to remain neutral in labor disputes by not compelling the employer to absorb these added costs (*ibid.*):

> Qualification for unemployment compensation thus acts as a lever increasing the pressures on an employer to settle a strike. The State has chosen to leave this lever in existence for situations in which the employer has locked out his employees, but to eliminate it if the union has made the strike move. Regardless of our views of the wisdom or lack of wisdom of this form of state "neutrality" in labor disputes, we cannot say that the approach taken by [the State] is irrational.

Here, as in *Hodory,* Congress has endeavored to construct a statutory scheme that will not favor either side in a labor dispute. Congress perceived that granting food stamps to striking employees enhances the union's power by alleviating some of the economic costs to one set of parties to the strike, thereby perhaps prolonging the strike.[11] Congress accordingly declined to provide, in the form of

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[11] Congress received testimony showing a causal connection between the provision of food stamps and the length of strikes. See *Proposed Reauthorization of the Food and Agriculture Act of 1977 (Food Stamps): Hearings Before the Senate Comm. On Agriculture, Nutrition, and Forestry,* 97th Cong., 1st Sess. Pt. II, at 162-165, 431-433 (1981). See also *id.* at 349-350 (statement of the National Labor-Management Foundation). Indeed, the declarations and affidavits submitted by appellees to the district court in support of their motion

food stamps, the practical equivalent of strike benefits that it believed could ordinarily be paid from union funds. See S. Rep. 97-139, *supra,* at 62. On the other hand, Congress took steps to avoid favoring employers involved in labor disputes. The statute accordingly provides that a household is ineligible for food stamps only where a member "is on strike * * * because of a labor dispute (*other than a lockout*)" (7 U.S.C. 2015(d)(3) (emphasis added)). And whereas the refusal of the head of the household to accept employment normally disqualifies the household from receiving food stamps (7 U.S.C. 2015(d)(1)), no disqualification results where that person "refuses to accept employment at a plant or site *because of a strike or lockout*" (7 U.S.C. 2015(d)(3) (emphasis added)).

The statutory scheme set forth in Section 2015(d)(3) is thus entirely rational. As this Court has noted, "the availability of state welfare assistance for striking workers * * * pervades every work stoppage [and] affects every existing collective-bargaining agreement." *Super Tire Engineering Co.* v. *McCorkle,* 416 U.S. 115, 124 (1974).[12] Congress was free to conclude, as it did, that by lending financial support to striking workers it would thereby "encourage[] * * * workers to 'wait out' management, rather than compromise" (S. Rep. 97-139, *supra,* at 62). And it was likewise free to conclude that it no longer wished to foster that result.

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for summary judgment confirm that Congress was correct in its determination that granting food stamps to striking workers typically prolongs strikes and increases negotiated wage rates. See J.A. 9, 21, 26, 28, 32, 45, 47, 52.

[12] Accord, *New York Tel. Co.* v. *New York Labor Dep't,* 440 U.S. 519, 531-532 (1979) (plurality opinion) (footnote omitted) (state unemployment compensation scheme, which furnished employer-financed benefits to striking workers, "not only provides financial support to striking employees but also adds to the burdens of the struck employers, * * * [thereby] alter[ing] the economic balance between labor and management").

In sum, the 1981 amendment to Section 2015(d)(3) addressed an array of legitimate governmental interests and did so in a way that cannot be described as "patently arbitrary or irrational." *United States Railroad Retirement Bd.* v. *Fritz,* 449 U.S. 166, 177 (1980). The statute thus easily meets the traditional "rational basis" test applied to public welfare programs. See *Weinberger* v. *Salfi,* 422 U.S. 749, 772 (1975); *Schweiker* v. *Wilson,* 450 U.S. at 230; *Vance* v. *Bradley*, 440 U.S. 93, 97 (1979); *Flemming* v. *Nestor,* 363 U.S. 603, 611 (1960). Every other court that has considered the constitutionality of Section 2015(d)(3) has held it valid on that basis. See *Ledesma* v. *Block,* No. G82-94 (W.D. Mich. Aug. 26, 1985), appeal pending, No. 85-1730 (6th Cir.); *United Steelworkers* v. *Block,* 578 F. Supp. 1417, 1421-1424 (D.S.D. 1982) (alternative holding).

B. Section 2015(d)(3) Does Not Warrant Heightened Scrutiny Under The Constitution

The district court acknowledged that Section 2015(d)(3) is "rationally related to legitimate legislative objectives—requiring a person able to work to do so in order to receive food stamps and promoting government neutrality in strikes" (J.S. App. 10a).[13] The case should have ended

[13] The district court at one point suggested that Congress's effort to justify Section 2015(d)(3) as an effort to tie receipt of food stamps to recipients' willingness to work was "seriously weakened" by what the court perceived to be "significant and discriminatory differences between the treatment accorded a striker who stops work in concert with others and an individual who quits a job" (J.S. App. 13a; see *id.* at 44a-47a). This reasoning is flawed. In according somewhat more favorable treatment to voluntary quitters, Congress could reasonably have concluded that strikers, who have a job waiting for them whenever they choose to return to it, are better off than quitters, who have no certain prospect of employment whatsoever. Moreover, offering food stamps to quitters does not require the government to support a particular side of a labor dispute, whereas Congress could

upon that conclusion. Instead, the district court embarked upon a rudderless voyage into heightened scrutiny. In so doing, the court relied, indiscriminately, upon cases involving suspect classifications, gender discrimination, fundamental rights, and "rational basis" analysis. This jumble of loosely connected precedent cannot support the application of heightened scrutiny to the legislative classification effected by Section 2015(d)(3).

1. The court held, first, that "[t]he disputed limitation on food stamps for strikers interferes or threatens to interfere with the First Amendment right of the individual plaintiffs to associate with their families, with their union, and with fellow union members" (J.S. App. 11a (citations omitted)). This Court rejected a nearly identical contention in *Lyng* v. *Castillo,* No. 85-250 (June 27, 1986). That case involved a challenge to a provision of the Food Stamp Act that generally treated parents, children, and siblings who live together as a single "household" for purposes of determining need and eligibility for benefits. Applying heightened scrutiny, the district court had concluded that this provision infringed the rights of family members to associate with one another. In reversing, this Court upheld the statutory classification because it did not " 'directly and substantially' interfere with family living arrangements and thereby burden a fundamental right" (slip op. 3 (citation omitted)). In particular, the Court ob-

rationally conclude that the provision of food stamps to strikers would have that undesired effect. In any event, "[i]f the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' " *Dandridge* v. *Williams,* 397 U.S. 471, 485 (1970) (citation omitted). "[T]he drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one. Perfection in making the necessary classifications is neither possible nor necessary." *Massachusetts Bd. of Retirement* v. *Murgia,* 427 U.S. 307, 314 (1976).

served that the provision defining "household" did not "order or prevent any group of persons from dining together" (*id.* at 4). And the Court found it "exceedingly unlikely that close relatives would choose to live apart simply to increase their allotment of food stamps" (*ibid.*).

More recently, in *Board of Directors of Rotary Int'l* v. *Rotary Club of Duarte,* No. 86-421 (May 4, 1987), the Court reaffirmed the proposition that associational rights are not abridged by statutes that on their face do not prevent the association from taking place. In that case, the appellant contended that a state law requiring local Rotary Clubs to admit women violated the First Amendment rights of members to associate in pursuit of various protected activities. This Court acknowledged that "Rotary Clubs engage in a variety of commendable service activities that are protected by the First Amendment" (slip op. 10). Rejecting the associational claim, however, the Court held that the challenged state law "does not require [the clubs] to abandon their basic goals * * *. Nor does it require them to abandon their classification system or admit members who do not reflect a cross-section of the community" (*ibid.*).

The Court's analysis in *Castillo* and *Rotary Club* squarely disposes of appellees' First Amendment "associational" claim. By limiting the availability of food stamps to households that include strikers, Congress did not "directly and substantially interfere" with family members' ability to associate with each other or "require them to abandon" one another. Nor did Congress directly interfere with union members' ability to associate with their union. See *Florida AFL-CIO* v. *Florida Dep't of Labor & Employment Security,* 676 F.2d 513, 516 (11th Cir. 1982) (rejecting First Amendment challenge to state statute that withheld unemployment compensation from workers who quit their jobs upon expiration of labor contracts). And there is no more reason here than in *Castillo* to believe that

families "will choose to live apart," or, to use the language from *Rotary Club,* to imagine that workers will "abandon" their union, in order to acquire food stamps.[14]

2. The district court also concluded that Section 2015(d)(3) abridges union members' First Amendment freedom of expression (J.S. App. 11a-12a). The court reasoned (*id.* at 11a (citation omitted)) that in order to qualify for food stamps, striking workers may find it necessary to " 'pressure their union to reach a settlement.' " Relying on this Court's decisions in *Abood* v. *Detroit Bd. of Education,* 431 U.S. 209 (1977), and *Sherbert* v. *Verner,* 374 U.S. 398 (1963), the district court held that in this manner Section 2015(d)(3) "interferes with strikers' right to express themselves about union matters free of coercion by the government" (J.S. App. 11a).

The district court's analysis ignores the fact that Section 2015(d)(3) does not prohibit union members from expressing their views. It simply refuses to fund the decision to strike. This Court has made it clear that while the Constitution "protect[s] against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom." *Harris* v. *McRae,* 448 U.S. 297, 317-318 (1980). "A refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity" (*id.* at 317 n.19). "It is one thing to say that a State may not prohibit * * * [an activity] and

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[14] If anything, Section 2015(d)(3) imposes fewer pressures on associational rights than did the statutory provisions upheld in *Castillo* and *Rotary Club.* In *Castillo,* the definition of "household" imposed a permanent limitation on the availability of food stamps to households made up of close relatives. The state law upheld in *Rotary Club* imposed a permanent constraint on the admission policies of the local clubs. In the present case, by contrast, the eligibility limitation applies only as long as the household member remains on strike.

quite another to say that such [activity] must * * * receive state aid." *Norwood* v. *Harrison,* 413 U.S. 455, 462 (1973). Accord, *e.g., Regan* v. *Taxation With Representation of Washington,* 461 U.S. 540, 545-546 (1983); *Maher* v. *Roe*, 432 U.S. 464 (1977); *Cammarano* v. *United States,* 358 U.S. 498 (1959).

The Court applied that principle in *Buckley* v. *Valeo,* 424 U.S. 1 (1976), when it sustained a statute that provided public funding for presidential conventions and campaigns, but which distinguished among major, minor, and new parties in the amount of allotted funds. Rejecting a claim that the statute abridged the First Amendment and Due Process rights of minor and new-party candidates, the Court stressed that unlike laws that "direct[ly] burden[] * * * the candidate's ability to run for office [and] * * * the voter's ability to voice preferences," the challenged statute "does not prevent any candidate from getting on the ballot or any voter from casting a vote for the candidate of his choice" (424 U.S. at 94). Whatever impediments a minor or new-party candidate may experience "derive not from lack of public funding," the Court explained, "but from their inability to raise private contributions. Any disadvantage suffered * * * is thus limited to the claimed denial of the enhancement of opportunity to communicate with the electorate that the [statute] afford[s] eligible candidates" (*id.* at 94-95).

Here, too, any incentive a striker may have to "pressure [his] union to reach a settlement" (J.S. App. 11a) does not stem from any species of governmental restraint. It derives, rather, from the striker's loss of wages, which the government has simply elected under Section 2015(d)(3) not to replace. But it has long been clear that "the right to bargain collectively does not entail any 'right' to insist on one's position free from economic disadvantage" (*American Ship Building Co.* v. *NLRB*, 380 U.S. 300, 309 (1965)). And the present case is easier than *Buckley*, since here the funds withheld from the claimants are not made available to their competitors.

For substantially the same reasons, Section 2015(d)(3) is distinguishable from the statute involved in the *Abood* case, on which the district court relied. The statute in *Abood* required public employees to contribute funds to employee unions, even though the unions used the funds to promote political objectives unrelated to their collective-bargaining responsibilities. The Court held that statute unconstitutional, observing that the law required public employees to support "an ideological cause [they] may oppose" (431 U.S. at 235). The statute challenged in *Abood* thus violated the principle "at the heart of the First Amendment * * * that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State" (*id.* at 234-235). Section 2015(d)(3), by contrast, does not require citizens to spend their money on political causes in which they do not believe. It simply withholds government funds from a class of households that Congress reasonably concluded had relatively less need of government assistance.

The *Sherbert* decision, also relied on by the district court, is equally inapposite. The Court in *Sherbert* upheld a Free Exercise challenge to a state denial of unemployment compensation benefits to a Sabbatarian who refused to work on Saturdays. See also *Hobbie* v. *Unemployment Appeals Comm'n,* No. 85-993 (Feb. 25, 1987). But the Court has never extended the reasoning in *Sherbert* beyond the unique context "of a constitutionally imposed 'governmental obligation of neutrality' originating in the Establishment and Freedom of Religion Clauses of the First Amendment." *Maher* v. *Roe,* 432 U.S. at 474-475 n.8 (refusing to extend the holding in *Sherbert* to a claim that a state statute was unconstitutional because it denied funding for abortions). Compare *Harris* v. *McRae*, 448 U.S. at 317 n.19 (refusing to extend *Sherbert* to a claim that a federal statute was unconstitutional because it withheld Medicaid funding for abortions) with *Thomas* v. *Review*

Board, 450 U.S. 707, 717-718 (1981) (applying *Sherbert* to a state denial of unemployment compensation to a worker who quit his job for religious reasons). See also *Buckley* v. *Valeo*, 424 U.S. at 93 n.127.

3. The district court next held (J.S. App. 12a-13a (citations omitted)) that labor unions in general, and striking workers in particular, warrant special constitutional protection in that they have historically been " 'subject to discrimination' " and possess " 'obvious and distinguishing characteristics.' " This Court has twice rejected that precise claim. In *City of Charlotte* v. *Local 660, Int'l Ass'n of Firefighters,* 426 U.S. 283 (1976), the Court upheld, under a rational-basis analysis, a city's refusal to withhold union dues from the paychecks of city firefighters. The Court specifically rejected the contention that "respondents' status as union members * * * is such as to entitle them to special treatment under the Equal Protection Clause" (426 U.S. at 286). Similarly, in *Ohio Bureau of Employment Services* v. *Hodory, supra*, the Court rejected a constitutional challenge to a state statute that denied unemployment benefits to persons whose unemployment resulted from a labor dispute. The Court upheld the statute under a rational-basis standard, expressly finding (431 U.S. at 489) that "[t]he statute does not involve any discernible fundamental interest or affect with particularity any protected class." Accord, *Russo* v. *Kirby*, 453 F.2d 548, 551 (2d Cir. 1971) (rejecting First Amendment and equal protection challenges to state law denying welfare benefits to strikers); *Francis* v. *Davidson*, 340 F. Supp. 351, 362-363 (D. Md.) (three-judge court), aff'd mem., 409 U.S. 904 (1972) (rejecting equal protection challenge to state regulations denying AFDC benefits to families of striking workers).[15]

[15] Moreover, it is obvious that strikers do not possess "immutable characteristic[s] determined solely by the accident of birth" (*Frontiero* v. *Richardson,* 411 U.S. 677, 686 (1973)), and that unions have not been "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process" (*San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1, 28 (1973)). These attributes, both of which are lacking here, are "the traditional indicia of suspectedness" (*Johnson* v. *Robison,* 415 U.S. 361, 375 n.14 (1974)).

Insisting, nevertheless, on some form of heightened scrutiny, the district court noted (J.S. App. 13a) that "labor unions and strikers have been the beneficiaries of extensive legislation designed to ameliorate historic discrimination against them." But the court drew exactly the wrong inference from this fact. Far from showing that heightened judicial solicitude is merited, a group's achievement of significant legislative success "belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary." *City of Cleburne* v. *Cleburne Living Center, Inc.,* 473 U.S. at 443. See generally J. Ely, *Democracy and Distrust* (1980). There is thus no basis whatever for the district court's suggestion that strikers are a "suspect" or "quasi-suspect" class.[16]

[16] For the same reason, the district court's reliance (J.S. App. 12a-13a) on *United States Dep't of Agriculture* v. *Moreno,* 413 U.S. 528 (1973), is misplaced. In *Moreno* the Court held unconstitutional a 1971 definition of "household" that effectively denied food stamps to households that shared their income with one or more unrelated persons. The Court observed that the statute had been enacted out of animus against "hippies" and held that such "a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." 413 U.S. at 534 (emphasis in the original). The district court here, by contrast, acknowledged that Section 2015(d)(3) is "rationally related to legitimate legislative objectives" (J.S. App. 10a), and, as we explain in the text, strikers are not a politically unpopular group or otherwise "suspect" class. Finally, the statutory scheme does not reflect the pervasive animus against strikers that the district court imagined. Under the first proviso to Section 2015(d)(3), for example, persons on strike retain whatever eligibility for food stamps they may have had before the strike began; they simply do not qualify for additional food stamps by reason of the

4. Finally, the court held (J.S. App. 13a) that because Section 2015(d)(3) "cuts off food stamps not only from a striker but also from the entire household, including the striker's spouse and children," the statute must be "narrowly tailored" in order to survive constitutional scrutiny. The court's holding mischaracterizes the structure and purpose of the statute, as well as the practicalities of its administration. More fundamentally, the court's underlying premise—that legislative lines must be narrowly drawn when they have an impact on the welfare of family members—cannot be squared with traditional equal protection principles.

To begin with, the district court paid insufficient attention to the fact that Congress chose to award food stamps to *households*, not to individual family members. The Act routinely provides that a household will lose its eligibility if one of its members performs, or fails to perform, certain acts. Thus, if the head of any household who is fit to work fails to register for work, or refuses to accept certain jobs, the entire household is disqualified from participation in the food stamp program. The same result follows if the head of a household voluntarily quits his job, or if any qualified member of a household refuses to participate in an approved "workfare" plan. In each of these situations, the "onus" of the statute may be said to fall, in the district court's words (J.S. App. 13a), "as heavily on the innocent members of the family as it does on" the person who refuses to accept employment. But the district court did not suggest, and it could not credibly be suggested, that these provisions are therefore unconstitutional for want of being "narrowly tailored."

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loss of income occasioned by the strike. And while Section 2015(d)(3) may disadvantage strikers to some degree, the statute incorporates other provisions that work to the disadvantage of employers involved in labor disputes, thus preserving an overall posture of government neutrality. See page 19, *supra*.

There is no logical basis for reaching a different result where, as here, a household's disqualification results from a member's refusal to accept employment by virtue of a strike. Section 2015(d)(3) can no more be said to "punish" a family for the conduct of a member who goes on strike than the provisions just described can be said to "punish" a family for the conduct of a member who refuses to work on other grounds. In positing a distinction between the two situations, the district court again hypothesized (J.S. App. 13a) that strikers occupy a privileged constitutional status. But that hypothesis, as we have already explained, is erroneous.

The district court surmised that it "would be neither difficult nor intrusive" for Congress to have adjusted the food stamp allotment so as to exclude only the striker himself rather than his entire family (J.S. App. 14a). This surmise is incorrect as a practical matter;[17] more fundamentally, it ignores basic equal protection principles. Legislative classifications need only be narrowly drawn when they impinge on fundamental interests or burden suspect classes. *Jones* v. *Helms*, 452 U.S. 412, 425 (1981); *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 51 (1973). In the absence of a basis for strict scrutiny, "a classification is not deficient simply because the State could have selected another means of achieving the desired ends." *Clements* v. *Fashing*, 457 U.S. 957, 969 (1982). It is true that the eligibility requirement erected by Section 2015(d)(3), like the rest of the Act's eligibility requirements, may have an effect upon "innocent members

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[17] Congress expressly found that the elimination of benefits to households of striking workers would reduce administrative costs. As the Senate report put it (S. Rep. 97-139, *supra*, at 119), "[b]ecause [strikers'] tenure in the program is temporary, their elimination will reduce the administrative expense of initiating and then terminating (usually within several months) eligibility."

of the family" (J.S. App. 13a). But that is a feature of most social welfare legislation. It is the function of such legislation to "allocat[e] limited public welfare funds among the myriad of potential recipients." *Dandridge* v. *Williams,* 397 U.S. at 487. Inevitably, classifications will be drawn that, in one respect or another, may be said to disadvantage certain needy persons. But this Court has never found unconstitutional an otherwise rational statute that allocates social welfare benefits simply because the prescribed allocation has such disadvantageous effects.[18]

C. The Judgment Of Congress On Questions Of Social Policy Is Entitled To Deference From The Courts

When judging the constitutionality of a federal statute, this Court gives significant deference "to the duly enacted and carefully considered decision of a coequal and representative branch of our Government." *Walters* v. *Nat'l Ass'n of Radiation Survivors,* 473 U.S. at 319. In particular, "[t]his Court has granted a 'strong presumption of constitutionality' to legislation conferring monetary benefits, because it believes that Congress should have

[18] The district court predicated its "narrow tailoring" requirement on this Court's decision in *Plyler* v. *Doe,* 457 U.S. 202 (1982), but that case simply will not bear such an expansive rendering. The Court in *Plyler* held unconstitutional a Texas statute that withheld funds for the education of children who were not legally admitted into the United States. In doing so, however, the Court made clear (457 U.S. at 221) that education is not "merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation." To the contrary, the Court noted (*id.* at 223) that the denial of an education—unlike the denial of routine welfare benefits—"imposes a lifetime hardship" and a "stigma of illiteracy [that] will mark [the children] for the rest of their lives." Moreover, whereas the Food Stamp program has always operated on a household basis, the statute in *Plyler* made only the "innocent children * * * its victims" (*id.* at 224). Only by ignoring the explicit rationale of the Court in *Plyler* could the district court find that decision to support its reasoning here.

discretion in deciding how to expend necessarily limited resources." *Schweiker* v. *Wilson,* 450 U.S. at 238 (citations omitted). Appellees nonetheless urge this Court to declare Section 2015(d)(3) unconstitutional on public policy grounds, contending (Mot. to Aff. 6-7) that the denial of food stamps to households of strikers has had undesirable effects on living arrangements in certain circumstances.

Whatever the merit of appellees' policy objections to Section 2015(d)(3), their arguments "are addressed to an inappropriate forum" (*United Steelworkers* v. *Bouligny, Inc.,* 382 U.S. 145, 150 (1965)). See, *e.g., Schweiker* v. *Hogan,* 457 U.S. at 590-592; *Schweiker* v. *Wilson,* 450 U.S. at 238-239. Congress, and not the judiciary, is charged with establishing eligibility requirements and benefit levels under the Food Stamp program, and the courts "do not sit to pass on policy or the wisdom of the course Congress has set." *Heckler* v. *Turner,* 470 U.S. 184, 212 (1985). "The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process." *Vance* v. *Bradley,* 440 U.S. 93, 97 (1979). However unwisely a court may think that a political branch has acted, "[g]overnmental decisions to spend money to improve the general public welfare in one way and not another are 'not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment.' " *Mathews* v. *De Castro,* 429 U.S. 181, 185 (1976) (quoting *Helvering* v. *Davis,* 301 U.S. 619, 640 (1937)).

CONCLUSION

The judgment of the district court should be reversed.
Respectfully submitted.

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APPELLEE'S

BRIEF

QUESTION PRESENTED

IS THE DISQUALIFICATION FROM FOOD STAMPS OF OTHERWISE ELIGIBLE STRIKERS AND THEIR HOUSEHOLDS A VIOLATION OF THE EQUAL PROTECTION COMPONENT OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT OR AN UNCONSTITUTIONAL INTERFERENCE WITH THE APPELLEES' FIRST AMENDMENT RIGHTS?

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, the appellees are the United Mine Workers of America (UMWA), Mary Berry, Johnie B. Blake, Barm Combs, Patricia Ann Combs, Mark Dyer, Geneva Dyer, and a class of otherwise eligible UAW and UMWA strikers and their households.

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No. 86-1471

In The

Supreme Court of the United States

October Term, 1987

RICHARD A. LYNG, Secretary of Agriculture,
Appellant,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, et al.,
Appellees.

Appeal from the United States District Court for he District of Columbia

BRIEF FOR APPELLEES

STATEMENT

This appeal concerns the constitutionality of a 1981 amendment to the Food Stamp Act which generally prevents households containing a member who is on strike from receiving food stamps. 7 U.S.C. § 2015(d)(3). The district court declared that the application of the challenged statute interfered with the First Amendment speech and associational rights of the appellees. The court below also held that the *per se* disqualification of strikers and their households from food stamps did not rationally further a legitimate governmental purpose and therefore violated the equal protection component of the Due Process Clause of the Fifth Amendment. (J.S. 1a-

16a).[1] The court subsequently granted injunctive relief to halt enforcement of the striker provision against otherwise eligible strikers and their households represented by the appellee unions. (J.S. 48a-50a).

A. The Food Stamp Program and the Striker Provision

Congress established the food stamp program with the passage of the Food Stamp Act of 1964. P.L. 88-525, 78 Stat. 703. The program was reauthorized and substantially revised by the Food Stamp Act of 1977. P.L. 95-113, Title XIII, 91 Stat. 958, 7 U.S.C. §§ 2011-2029 (1982). Congress stated its dual purposes in establishing the program as seeking ". . . to safeguard the health and well-being of the Nation's population by raising levels of nutrition among low-income households" as well as "strengthen[ing] the Nation's agricultural economy . . . ." 7 U.S.C. § 2011. Accordingly,

> [t]o alleviate such hunger and malnutrition, a food stamp program [was] authorized which will permit low-income households to obtain a more nutritious diet through normal channels of trade by increasing food purchasing power for all eligible households who apply for participation. *Id.*

As enacted in 1964, the food stamp program was not a nationally uniform food assistance program, as provided under current law. The history of the program since that time demonstrates that in response to gaps in the program, Congress has expanded its scope to further its purpose of alleviating hunger and mal-

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[1] "J.S." refers to the Appendices to the Jurisdictional Statement. "J.A." refers to the Joint Appendix.

nutrition.[2] Despite this deliberate growth in the program, hunger remains a significant social problem in the United States.[3] Recent estimates have found that at least one third of those financially eligible for food stamps do not participate in the program.[4] Thus, despite the program's growth, there remains a demonstrated need for the food stamp program.

The food stamp program pays benefits to households in the form of coupon allotments ("food stamps") which are used solely for the purchase of food from retail stores. 7 U.S.C. §2013(a). The maximum allotments are based upon a "thrifty food plan" developed by the Department of Agriculture and revised annually by the

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[2] With the passage of 1970 amendments, Congress established uniform national eligibility standards. P.L. 91-671, § 5(b), 84 Stat. 2048. Prior to their taking effect in 1971, the states had a substantial role in setting food stamp eligibility rules. H.R. Rep. 95-464, 95th Cong., 1st Sess. 292-295 (1977). States and localities entered the program at their option efore July 1974. Up to that time, the geographical coverage of the food stamp program was limited, with approximately 800 counties not under the program in 1973 and half the counties not in the program in 1968. H.R. Rep. 95-464 at 295-296; 114 *Cong. Rec.* 24234-24235 (July 30, 1968) (remarks of Rep. Sullivan). Congress adopted an amendment expanding the food stamp program to all areas of the country in 1973. P.L. 93-86, § 3(i), 87 Stat. 247-248.

Congress took a third step to improve the program's effectiveness against hunger when it eliminated the requirement that eligible households "purchase" food stamps by paying an amount equal to thirty percent of the value of the household's food stamp allotment. P.L. 95-113, § 1301, 91 Stat. 968. This change was intended to significantly increase the participation of low income households financially eligible for food stamps but unable to afford the purchase requirement. H.R. Rep. 95-464 at 238-243.

[3] Physician Task Force on Hunger, *Hunger in America*, Harvard Univ. School of Public Health (1985); Report of the President's Task Force on Food Assistance (1984).

[4] *Hunger in America, supra*, Appendix A; Children's Defense Fund, *A Children's Defense Budget* (1987), 124-129; Coe, "Nonparticipation in Welfare Programs by Eligible Households: The Case of the Food Stamp Program," 17 *Journal of Economic Issues* 1035 (1983).

Department to reflect the cost of a diet for a family of four. 7 U.S.C. § 2012(o). Currently, the maximum monthly allotment for a family of four with no net income is $271.00. The maximum food stamp allotment for a single individual with no countable income is $81.00 a month. 51 *Fed. Reg.* 36044 (October 8, 1986).

7 U.S.C. § 2014(a) provides that:

> Participation in the food stamp program [is] limited to those households whose incomes and other financial resources . . . are determined to be a substantial limiting factor in permitting them to obtain a more nutritious diet.

Maximum household allotments are therefore reduced by countable income. 7 U.S.C. § 2014(b), § 2014(f) and § 2017(a). Households with an elderly or disabled member must have a net monthly income, after applicable deductions, below the federal poverty level. 7 U.S.C. § 2014(c)(1). All other households must have net monthly income below the poverty level, as well as gross monthly income less than 130% of the poverty level. 7 U.S.C. § 2014(c)(1) and (2). These levels are annually adjusted. The present maximum net income level for one and four-person households is $459 and $934 a month, respectively. 52 *Fed. Reg.* 19902 (May 28, 1987). The gross monthly income standards are $596 for an individual and $1214 for a four-person household. In other words, a four-person household without an elderly or disabled member is ineligible unless its gross non-exempt income is under $1214 a month, even if its deductions were sufficient to reduce its net income below the poverty level of $934 a month. *Id.*

Households must also have available financial resources below maximum levels. The maximum allowable amount of household financial resources under current law is $2000. Households containing a member over sixty years of age are permitted up to $3000 in resources. 7 U.S.C. § 2014(g).[5]

These income and resource guidelines can be illustrated through their application to striker households, with strike benefits assumed as the only income. A four-person family containing a United Mine Workers of America striker would be eligible for a fifty-eight dollar monthly food stamp allotment. (J.S. 59a).[6] A UAW striker household of four members with only strike insurance benefits as income would receive a monthly allotment of $187 in food stamps. (J.S. 60a). If striker households had other non-exempt income, the amounts shown here would be appropriately adjusted. 7 C.F.R. § 273.9(b) (1987).[7] Of course, due to their disqualification from food stamps, strikers and their households have not participated in the food stamp program since 1981, regardless of their financial need.

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[5] Income and resources, as well as many other characteristics, must be provided by sworn application or report for each month the non-public assistance household participates, and are subject to verification by the state food stamp agency following a face-to-face interview. 7 U.S.C. § 2014(f)(3)(B), § 2015(c), § 2020(e)(2); 7 C.F.R. § 273.2 and § 273.21 (1987). If eligibility is established, certification for participation in the program is granted for a period of one to twelve months, depending upon each household's circumstances. Households must report any relevant changes in circumstances within 10 days to the caseworker assigned to the household's case. 7 C.F.R. § 273.12 (1987). All non-exempt household members must also register for work and "job ready" participants must seek work. 7 C.F.R. §§ 273.7(a) and (f) (1987).

[6] The UMWA's selective strike fund presently provides $200 a week in benefits. The UAW's strike insurance program pays $100 a week. Pursuant to prior law, strike benefits were counted as income in the determination of food stamp eligibility. H.R. Rep. 95-464, at 128.

[7] The precise calculations and other similar striker household food stamp budgets are set out at J.S. 58a-61a. One-, two-, and three-person UMWA striker households would exceed the gross income limits, as would one-person UAW households. (J.S. 59a-60a).

Between 1968 and 1977, Congress considered and consistently rejected proposals to exclude strikers, or households containing strikers, from the food stamp program.[8] In 1979 and 1980, Congress passed amendments which emphasized existing law — that strikers were eligible for food stamps only if they met the existing income and resource limits, as well as the program's work registration requirements. P.L. 96-58, § 9, 93 Stat. 392 (1979); P.L. 96-249, § 114, 94 Stat. 361 (1980). These provisions were preferred over *per se* striker disqualification proposals. H.R. Rep. 96-788, 96th Cong., 2d Sess. 131-132 (1980).

In 1981, the amendment at issue here finally became law as part of the Omnibus Budget Reconciliation Act of 1981. P.L. 97-35, § 109(a), 95 Stat. 361, 7 U.S.C. § 2015(d)(3). The challenged amendment prohibits the participation in the food stamp program of an entire household which contains a member on strike because of a labor dispute, other than a lockout. A household exempt from work registration or eligible for food stamps prior to the strike is not disqualified by the striker provision. *Id.*

[8] In 1968, the House passed legislation to disqualify from food stamps any "person" engaged in a labor dispute, unless the person was eligible prior to the existence of the dispute. 114 *Cong. Rec.* 24242-24244 (July 30, 1968). The provision was not agreed to in conference, and did not become law. H.R. Rep. 1908, 90th Cong., 2d Sess. 2 (1968). In 1970, a striker provision was passed by the House near the end of the session, but did not become law due to a lack of Senate action. 116 *Cong. Rec.* 42033-42035 (December 16, 1970). In 1971 and 1972, the House rejected proposed amendments to appropriations measures which would have prohibited food stamp participation by households containing a striker, if the household's need for assistance was due to the striker's participation in the strike. 117 *Cong. Rec.* 21671-21677 (June 23, 1971); 118 *Cong. Rec.* 23364-23378 (June 29, 1972). In 1973, the House adopted an amendment to the Act disqualifying households from participation while its "principal wage-earner" was on strike. 119 *Cong. Rec.* 24928-24940 (July 19, 1973). The Conference Committee eliminated this provision. H.R. Rep. 93-427, 93d Cong., 1st Sess. 40 (1973). A similar proposal was rejected by the House in 1974. 120 *Cong. Rec.* 20613-20616 (June 21, 1974). In 1977, during the reauthorization of the food stamp program, the House Agriculture Committed again reviewed the striker issue and rejected any striker disqualification. H.R. Rep. 95-464, 95th Cong., 1st Sess. 122-129 (1977).

B. The Facts Below

The appellees are two labor organizations, four striking union members, members of the individual strikers' households, and a class of similarly situated households. (J.S. 17a-18a, 69a-70a). They brought this lawsuit against the Secretary of Agriculture in October 1984. (J.A. 1). The appellees challenged the constitutionality of a section of the Food Stamp Act (the "striker provision") which disqualifies, in most circumstances, a household containing a striker. 7 U.S.C. § 2015(d)(3). Following discovery, the case was submitted to the district court on cross-motions for summary judgment. Thus, the facts were largely uncontested and the dispute between the parties was basically confined to the constitutionality of the striker provision. The facts developed below illustrate the operation of the striker provision.

Appellee Mary Berry went on strike at the time of the expiration of the labor agreement between the UAW and her employer in September 1980. (J.A. 6). The employer hired non-union replacements for the strikers in October 1980. (J.A. 51). At the time the strike started, Ms. Berry lived in an apartment with her son. (J.A. 7, 69-70). She received strike insurance benefits from the UAW. These benefits were $65 per week at the beginning of the strike, $85 a week from May 1983 until November 1984, and $100 a week thereafter. (J.A. 68).

In March or April 1981, Ms. Berry applied for and received approximately sixty dollars' worth of food stamps through the Michigan Department of Social Ser-

vices for that month. (J.A. 7, 69). In April 1981, Mary Berry moved from her apartment to a rooming house and gave up custody of her son, who went to live with his father. (J.A. 7, 69-70). She again applied for food stamps on August 27, 1984. Her application was denied that day solely due to her status as a striker. (J.A. 7, 69). Ms. Berry obtained part-time work in August 1985, but she remained on strike at the time she filed her answers to interrogatories in January 1986. (J.A. 67).[9]

Appellee Johnie B. Blake was engaged in a strike from April 16, 1983 until October or November 1984 in response to her employer's demands for concessions and its relocation of work from its Rockford, Illinois location. A variety of unfair labor practice complaints were issued by the NLRB against Ms. Blake's employer during the strike. (J.A. 10, 16-18). The employer hired replacements for Ms. Blake and her fellow strikers soon after the start of the strike. (J.A. 14-15).

At the start of the strike, Johnie Blake's household included her daughter Charisse, Charisse's infant daughter, and Ms. Blake's teenaged son. Charisse and her daughter received food stamps beginning around June 1982. In the interim, three grandsons of Ms. Blake were placed in her household by a state agency who removed them from the custody of another of her daughters. In June 1983, Johnie Blake sought food stamps for her three grandsons. This application was denied due to her status as a striker and Charisse's food stamps were also cut off because of her mother's striker status. (J.A. 55). Ms. Blake again sought food stamps and was denied

[9] An administrative law judge found that the employer had engaged in unfair labor practices by failing to bargain with the UAW in good faith in late 1983. This decision was appealed by the employer. (J.A. 52). The strike was eventually ended by the remaining UAW members in June 1986. The employer's appeal remains undecided at this time.

due to the striker provision in July 1984. *Id.* The Blake household received $98 a month in food stamps after the strike ended in late 1984. (J.A. 56).

Appellees Barm Combs and Mark Dyer are members of the United Mine Workers of America. They went on strike on August 1, 1984, protesting their employer's refusal to abide by the national bituminous coal agreement. (J.A. 19, 23, 25). The NLRB issued an unfair labor practice complaint against the employer in October 1984. (J.A. 23, 39-40). The strike continued until a new agreement was signed in April 1985 and Mr. Combs and Mr. Dyer returned to work. (J.A. 61, 72).

During the strike, Barm Comb's spouse and his four children were financially dependent upon him for support. He received $150 per week in strike benefits. (J.A. 73). He sought food stamps in September 1984 and November 1984. His application was denied on both occasions because he was a striker. (J.A. 20). In December 1984, Mr. Combs decided that he "could no longer last on the picket line . . . ." (J.A. 20). He accepted an offer to work at a non-union mine. (J.A. 20, 76). In the interim, between the start of the non-union job and his receipt of wages, Barm Combs reapplied for food stamps. (J.A. 21, 78). His household received "about $300" worth of food stamps in December 1984. (J.A. 21, 74). Thereafter, he was ineligible due to his earnings. (J.A. 79). When he returned to work in April 1985, he rejoined the UMWA and paid a new initiation fee. (J.A. 21, 79). Mr. Combs stated that:

> I believe that if I had gotten food stamps to help my family during the strike against Brush Creek Coal Company, I would have stayed on the picket line throughout the strike and would not have abandoned my union membership.
>
> (J.A. 21).

Mr. Dyer also applied for food stamps during the strike. His application was denied due to his striker status. (J.A. 24, 25, 82). As the strike continued, the financial pressure resulted in Mr. Dyer's spouse Geneva Dyer and his four children leaving the household. Subsequently, the Dyers were divorced. (J.A. 26, 82-83). Mrs. Dyer and the children received food stamps after the separation in December 1984. (J.A. 26, 63). Mr. Dyer testified that the denial of food stamps was a factor contributing to the breakdown of his marriage. (J.A. 63, 82-83).

In addition to the circumstances of the individual appellees, numerous affidavits were submitted to demonstrate the harmful effects of the striker provision upon strikers and their households. Some individuals stated that the denial of food stamps was one of the causes of changes in family living arrangements. (J.A. 4, 30, and 47). Another abandoned his strike, sought other work, and lost his union membership. (J.A. 49). This evidence was not seriously contested by the Secretary below. In fact, the Secretary conceded that a striker had two alternatives to avoid the striker provision. "[S]omeone on strike can either return to work or quit his job. Both of these actions demonstrate that the individual is no longer on strike." (J.A. 2). The Secretary further argued below that "workers feeling the pinch of a prolonged strike can pressure their union to reach a settlement." (J.S. 39a-40a, quoting "Defendant's Response to Questions Nos. 3 and 4" at 3). The Secretary also did not contest the proposition that a striker household can avoid the food stamp disqualification if the striker leaves the household. (J.S. 15a).

In addition, there was clear evidence that the striker provision's disqualification was indeterminate in length, and has been applied to deny food stamps to striker

households after permanent replacements were hired into their jobs. (J.A. 7, 13-15, 34-35, 37-38, and 49-50).[10] The district court found that the striker provision had operated to deny food stamps to households for an indeterminate period, even after the striker's permanent replacement by his employer. (J.S. 4a-6a). In order to avoid this disqualification from food stamps, the court found that:

> . . . strikers have the choice of leaving their households, abandoning a strike by returning to work, quitting their jobs, or attempting to persuade their unions to call off the strike.
>
> (J.S. 5a).

In addition, the appellees established that strikers have lost or abandoned their union membership due, in part, to the financial pressures contributed to by their household's disqualification from food stamps. (J.S. 6a-7a). The appellees also established numerous factual distinctions under the Food Stamp Act between the treatment of strikers and their households and the treatment of individuals and members of their household who voluntarily leave their employment. (J.S. 44a-47a).

C. The Decision Below

Grounding its analysis in the established facts, the district court declared that the striker provision was unconstitutional on the related, but alternative, grounds of the First Amendment and the equal protection component of the Due Process Clause of the Fifth Amendment.

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[10] In these cases, permanently replaced strikers were denied food stamps despite an unpublished policy of the Secretary instructing state agencies not to disqualify strikers who are permanently replaced.

The district court based its declaration upon five legal conclusions. (J.S. 11a-15a).

First, the court determined that the striker provision "interfered or threatened to interfere with the First Amendment right of the individual plaintiffs to associate with their families, . . . with their union, . . . and with fellow union members, . . . as well as the reciprocal First Amendment right of each union plaintiff to its members' association with the union." (J.S. 11a) (Citations omitted).

Second, the district court held that the "statute as administered interferes with strikers' rights to express themselves about union matters free of coercion by the government." (J.S. 11a) (Citation omitted). Analogizing to the situation in which the denial of unemployment insurance benefits was held to impermissibly pressure an individual's free exercise of religion, the court found that:

> The same dynamic is present here and requires a conclusion that denial of food stamps to the individual plaintiffs violates that First Amendment right to associate and to express themselves freely in the course of that association.
>
> (J.S. 12a).

Next, noting the historically hostile governmental treatment of strikers and the factual context of this case, the district court concluded that this case was controlled by *Department of Agriculture* v. *Moreno*, 413 U.S. 528 (1973), rather than *Lyng v. Castillo*, No. 85-250, Slip Opinion (June 27, 1986). (J.S. 13a).

Fourth, the court rejected the Secretary's argument that the striker provision was justified because it tied eligibility for food stamps to a willingness to work. The

court found this justification seriously weakened by the "significant and discriminatory differences between the treatment accorded a striker who stops work in concert with others and an individual who quits a job." (J.S. 13a; *see also* J.S. 44a-47a).

The court's fifth conclusion turned on the treatment of non-striking household members. As the court held, the striker provision's disqualification of the entire household

> . . . necessarily means that a striker who is a member of a household and who exercises his constitutionally protected rights to associate with his union and other members and to form and express his opinion about the merits of the strike sacrifices not only his own food stamps but also those of other members of his household, including infant children and the dependent elderly.
>
> (J.S. 13a).

The court then examined the Secretary's asserted justifications for the household's disqualification and concluded that neither administrative convenience nor government neutrality in labor disputes were justifications for the denial of food stamps to non-striking household members. (J.S. 13a-15a).

Based upon these conclusions, the court declared the striker provision unconstitutional. (J.S. 15a).

SUMMARY OF ARGUMENT

The district court's judgment that the striker provision was unconstitutional rested upon both First Amendment and Fifth Amendment grounds. (J.S. 15a). The appellees

here alternatively challenge the striker provision as violative of their rights under each of these constitutional amendments. Relying upon the established record, and the amply-supported findings of the court below, the appellees established that the striker provision is applied to indeterminately disqualify otherwise eligible households from food stamps solely because a household member was engaged in a strike. The appellees first show that this punitive treatment of striker households fails in practice to advance any legitimate governmental purpose, thus violating the rational basis standard of the equal protection component of the Due Process Clause of the Fifth Amendment. Second, the appellees show that the financial burden of disqualification from food stamps uniquely visited upon striker households significantly encroaches upon their rights of free association protected by the First Amendment. Since the Secretary has failed to advance any significant governmental interest served by the striker provision which cannot be more narrowly accommodated, the striker provision likewise violates the appellees' First Amendment rights.

The Food Stamp Act has as its stated purpose "alleviat[ing] . . . hunger and malnutrition" by allowing "low-income households to obtain a more nutritious diet . . . by increasing food purchasing power for all eligible households who apply for participation." 7 U.S.C. § 2011. Consistent with this purpose, participation is contingent upon a demonstrated financial inability to purchase sufficient food. Households able to demonstrate the requisite need — in the form of limited income and resources — are entitled to receive "food stamps" which can be used solely to increase the household's food purchasing power. With the striker provision, however, Congress has excluded from participation any household which — although incapable of purchasing

sufficient food — includes a household member separated from employment because of a strike.

Not only does the striker provision depart radically from the Food Stamp Act's generally need-based participation criteria, the striker provision also stands alone as the sole instance in which benefits are denied indefinitely to an entire household because of the circumstances surrounding a single household member. Individuals who voluntarily quit employment without good cause, refuse suitable work without good cause, or commit fraud in submitting their applications for food stamps, will temporarily delay or decrease their household's eligibility. In none of these instances, however, does the act of a single household member indefinitely, completely, and without opportunity to demonstrate "good cause," foreclose eligibility for the entire household. The striker provision thus singles out households containing strikers for treatment more punitive even than that reserved for households containing individuals who commit fraud or those containing individuals who voluntarily quit without good cause.

Two additional features of the striker provision deserve mention at the outset. By disqualifying an entire household because of the circumstances surrounding one of its members, the striker provision operates to deprive the striker's family and children of need-based assistance for which — because of their limited income and resources — they would be otherwise eligible. This deprivation is not justified by any of the governmental interests asserted by the Secretary and is not administratively compelled. In addition, the striker provision requires the members of a striker household — alone among all other Food Stamp households — to accept work vacant due to a labor dispute, again highlighting the irrationality of the striker provision.

A second, alternative basis for affirming the district court is furnished by a consideration of the striker provision's impact upon the appellees' First Amendment rights. Strikers are necessarily involved in an associational activity, supporting their union and their mutual interests through related First Amendment activities to enhance union and worker interests. Wholly apart from the right to strike, the rights to join a union and to engage in group activities to promote the group's lawful interests are constitutionally protected. The striker provision effectively penalizes those exercising associational rights by conditioning food stamp eligibility solely upon the striker status of a household member.

Furthermore, since the striker provision disqualifies the entire striker household, it invokes not only the appellees' rights to "expressive association," but also their rights to "intimate association" — to choose those with whom they wish to live as a household. The financial pressures produced by the denial of food stamps has been shown to burden these associational freedoms significantly. The ordinary governmental interests purportedly served by the striker provision cannot furnish a valid justification for this burden on First Amendment rights. This is especially true when the administrative scheme of the food stamp program would easily permit the disqualification of strikers alone — without disqualifying the remainder of their households.

This Court has never permitted the government to condition eligibility for benefits upon foregoing the exercise of First Amendment rights or depriving an individual of an otherwise available benefit due to the exercise of protected rights. Realizing this Court's longstanding precedent in this regard, the Secretary attempts to portray this case as a governmental refusal to fund the exercise of rights. However, the extension of the

funding analogy to this case is inappropriate, since the total denial of food stamp benefits under the striker provision is triggered by the exercise of protected rights. Moreover, while in the abortion context the government need not remain neutral in the decision to choose between abortion and childbirth, in the First Amendment context governmental neutrality is mandated. The striker provision denies benefits solely due to the protected activity of appellees in violation of the First Amendment, which does not countenance governmental action which penalizes the exercise of associational freedoms.

ARGUMENT

I.

THE STRIKER PROVISION DOES NOT RATIONALLY FURTHER A LEGITIMATE GOVERNMENTAL PURPOSE.

1. In enacting the Food Stamp Act of 1977, Congress created a broad-based program "to safeguard the health and well-being of the Nation's population by raising levels of nutrition among low-income households." 7 U.S.C. § 2011. The program is designed to "permit low-income households to obtain a more nutritious diet through normal channels of trade by increasing food purchasing power for all eligible households who apply for participation." *Id.* Participation in the program is conditioned upon a financial inability to purchase a sufficiently nutritious diet:

> Participation in the food stamp program [is] limited to those households whose incomes and other financial resources . . . are determined to be a substantial limiting factor in permitting them to obtain a more nutritious diet.
>
> 7 U.S.C. § 2014(a).

Consistent with these goals, the Food Stamp Act generally awards benefits to any household whose income and resources fall below the statutory guidelines.[11]

The Due Process Clause of the Fifth Amendment mandates that when Congress places limits on participation in a social welfare program, the classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Reed* v. *Reed*, 404 U.S. 71, 76 (1971), quoting *Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920). In *City of Cleburne* v. *Cleburne Living Center*, 473 U.S. 432, 439 (1985), this Court reaffirmed that the rational basis test "is essentially a direction that all persons similarly situated should be treated alike." Furthermore, the government "may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." 473 U.S. at 446.[12]

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[11] Aside from the striker provision, the only exceptions to the need-based nature of the Act's eligibility requirements involve fraud (7 U.S.C. § 2015(b) and § 2015(h)); refusals to provide necessary information (7 U.S.C. § 2015(c)); refusals to register for or accept available work despite being required to so so (7 U.S.C. § 2015(d)(1)(A)); some full-time students (7 U.S.C. § 2015(e)); illegal aliens (7 U.S.C. § 2015(f)); and heads of households who voluntarily quit employment without good cause (7 U.S.C. § 2015(d)(1)(B)).

[12] It is difficult to fathom the Secretary's repeated assertions that the district court applied the "heightened scrutiny" reserved for legislative classifications based on "suspect" criteria such as race. The district court clearly noted that appellees did not advocate the use of any test other than the rational basis test described in text. (J.S. 8a, 28a). The court below, in adopting a standard of scrutiny, agreed with appellees that "heightened scrutiny may not be in order," (J.S. 10a) and proceeded to apply the rational basis standard set forth above. The court below, in addition, termed the disqualification of non-striking household members critical to its appraisal of the "rationality" of the statute. (J.S. 13a). In the final analysis, the district court

(*concluded on page 19*)

It is plain, of course, that a legislative classification directing welfare benefits cannot be justified by a mere showing that the classification will reduce expenditures or save money. By definition, any classification which excludes from eligibility some group of potential recipients of government benefits will save money. The rational basis test, however, requires that classifications — even those which reduce government expenditures — must rest on some rational ground and further some legitimate governmental objective. As the Court stated in *Plyler* v. *Doe*, 457 U.S. 202, 227 (1982), "a concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources . . . . The state must do more than justify its classification with a concise expression of an intention to discriminate." *See also*, *Shapiro* v. *Thompson*, 394 U.S. 618, 633 (1969); *Graham* v. *Richardson*, 403 U.S. 365, 374-375 (1971).

The Secretary's repeated observation that disqualifying strikers will reduce food stamp expenditures is therefore entirely beside the point. Instead, the classification

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found that this case was controlled by *Department of Agriculture* v. *Moreno*, 413 U.S. 528 (1973) rather than *Lyng* v. *Castillo*, No. 85-250, Slip Opinion (June 27, 1986). As *Castillo* recognized, both *Moreno* and *Castillo* involved application of the rational basis test to legislative classifications contained in the Food Stamp Act. *Castillo*, Slip Op. at 4.

Indeed, the Secretary's long discussion of the district court's references to the historically hostile treatment of strikers (Sec. Br. at 26-27) entirely misconstrues that discussion's place in the district court's reasoning. The Secretary asserts that that discussion demonstrates that the district court was "[i]nsisting . . . on some form of heightened scrutiny." (Sec. Br. at 27). On the contrary, the district court concluded the discussion to which the Secretary refers by concluding "[t]his history makes this case more nearly resemble *Moreno* than *Lyng*" — both cases involving a rational basis test. (J.S. 13a).

In any event, appellees here seek invalidation of the striker provision under a rational basis test.

excluding needy strikers and their families can only survive constitutional scrutiny if that classification is rationally related to legitimate governmental objectives and assures that persons similarly situated are treated alike. Indeed, the Secretary acknowledges that the striker provision can only pass the rational basis test if it furthers some legitimate purpose and "accord[s] like treatment to similarly situated individuals." (Sec. Br. at 15). As appellees will show, the *per se* disqualification of needy households containing strikers fails this test.

2.A. At the outset, it is important to recognize that the purpose and effect of the striker provision is to disqualify — solely because a household member is separated from employment due to a strike — *households which otherwise meet the financial eligibility criteria for food stamps*. Prior to enactment of the striker provision in 1981, the Food Stamp Act did not take into account potential recipients' striker or non-striker status: households including strikers were given the opportunity — like other households — to demonstrate that their income and resources were sufficiently limited to qualify for benefits. Households containing strikers were neither automatically eligible nor ineligible; rather they were treated like other households not containing strikers. S. Rep. 97-139 at 61; H. R. Rep. 96-788 at 131-132.[13] Thus, the category of

[13] Figures gathered prior to the 1981 amendments illustrate that eligibility for strikers was by no means automatic. A Government Accounting Office study found that in four of the five periods studied, 89 to 96 percent of all strikers did *not* participate. The fifth period included the 1978 coal strike, during which 64 percent of strikers did not participate. 127 *Cong. Rec.* S6136-6137 (June 11, 1981) (remarks of Senator Levin). 1975 figures showed that strikers consisted of .2 to .3 percent of the non-public assistance food stamp households. H. R. Rep. 95-464 at 128.

Thus, before 1981, most striker households never participated in the food stamp program presumably because their income and re-

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households to which the striker provision denies benefits are those households containing strikers which, by definition, have income and resources so severely limited that they cannot purchase sufficient food.

The striker provision does not "channel scarce resources to persons who [are] genuinely in need" (Sec. Br. at 17) for a simple reason: the striker provision is not need-related at all. The very point of the 1981 amendment was to deny benefits to all households containing strikers, *even those households whose income and resources are so limited that an adequate diet cannot be obtained without assistance*. Food stamp recipients must prove financial hardship by demonstrating that both their income and resources fall below the statutory guidelines. The striker provision neither adds to nor subtracts from these need-based financial requirements. Rather, it automatically disqualifies any household — no matter how limited or abundant its resources — solely because a household member is on strike. What the Secretary's argument here fails to acknowledge is that households which have lost their income and depleted their resources due to a strike are no less in need of assistance than households which have lost their income for other reasons. On its face, then, the striker provision does not relate to financial need at all and therefore cannot be said to direct governmental benefits to those in "genuine need."

The Secretary, to be sure, attempts to relate an individual's striker status to need by claiming that those households whose members are on strike have "greater

(*continued from page 20*)

sources did not fall below the financial guidelines. Also, the small percentage of striker households which could show sufficiently limited income and resources to qualify constituted only an infinitesimal portion of the program's expenditures, hardly justifying the sweeping disqualification imposed in 1981.

access to the means of self-support than households whose members are entirely without employment opportunities." (Sec. Br. at 17). The unstated but implicit premise in this argument is a claim that strikers have voluntarily left work and can return to work at any time during a strike. But that premise is simply not true for two reasons. First, in many instances a struck employer will not operate during a strike. In an additional minority of situations, the employer will permanently replace its striking workers.[14] Cf. *NLRB* v. *MacKay Radio*, 304 U.S. 333 (1938). In either of these situations, the individual striker does *not* have the option of returning to work, and is therefore not voluntarily refusing an employment opportunity.

Second, it is not intuitively obvious that all individuals separated from employment due to a strike have "voluntarily" left work. As already noted, many employers will either cease operations during a strike or retain permanent replacements, in either case making return to work impossible. Moreover, strike votes are made by a major-

[14] Illustrative examples are provided by the record in this case. Appellee Mary Berry, on strike in response to unfair labor practices committed by her employer, was permanently replaced by her employer in 1980 but continued to be ineligible for food stamps. (J.A. 6-7, 51). Appellee Johnie B. Blake was permanently replaced soon after her local union began an unfair labor practice strike. (J.A. 13-15). Further, the employer there refused to offer positions to former strikers offering to return to work several years later. (J.A. 16-18). Blake remained disqualified throughout the course of the strike and, even after the strike was officially terminated, experienced delay and difficulty in obtaining stamps. (J.A. 13-15). Finally, Donald Gibson, whose union began an unfair labor practice in June of 1984, did attempt to return to work in August 1984, but was told by his employer that no work was available because he had been permanently replaced. (J.A. 33-35). Over a year later, however, the local food stamp agency determined that he remained ineligible as a "striker," however, because he was "still a member of the Union and still receiving strike pay." (J.A. 35).

ity of affected employees; unanimity is not required. While we do not, of course, suggest that eligibility should be contingent upon a showing that participation in a particular strike is involuntary, it is noteworthy that an argument based on the "voluntary" nature of a striker's separation from employment is somewhat problematic. H.R. Rep. 96-788, at 132-133. Even the minority of situations in which the employer is offering the "opportunity" for strikers to perform struck work does not serve to justify the disqualification provision at issue here. For all potential recipients *except strikers*, the Act does not condition eligibility on a willingness to cross picket lines and perform struck work.[15] Thus, nonstrikers are allowed to refuse employment "opportunities" available due to a strike. Only strikers are required — as a condition of eligibility — to cross a picket line and perform struck work. In other words, two individuals "similarly situated" being offered work behind picket lines — one a striker and one a nonstriker — are not provided with similar treatment: the striker who refuses to perform the struck work is disqualified, while the nonstriker does not jeopardize his or her eligibility by refusing that very same work.

B. The harsh treatment of strikers and their households cannot be justified as a rational response to the fact that strikers have "voluntarily" separated themselves from employment and foregone a portion of their household's income. Any such justification is wholly belied by a comparison between the food stamp rules regarding strikers and those in the same position in this regard: voluntary quitters.

[15] The final proviso to § 2015(d)(3) provides that the striker "ineligibility shall not apply to any household that does not contain a member on strike, if any of its members refuses to accept employment at a plant or site because of a strike or lockout." 7 U.S.C. § 2015(d)(3).

As is entirely appropriate, the Food Stamp Act is somewhat circumspect in evaluating the eligibility of households in which the "head of the household voluntarily quits any job . . . ." 7 U.S.C. § 2015(d)(1)(B)(ii). In such cases, the household will be ineligible for a period of 90 days following the quit *only if* the state agency — *after* notice and a fair hearing — determines that the voluntary quit was *"without good cause."* 7 C.F.R. § 273.7(n)(2)(iii); § 273.7(n)(2)(ii) (1987). Voluntary quits determined to be for "good cause" will not result in *any* delay or reduction in benefits. "Good cause," in turn, is defined in applicable regulations to include, among other things, "[d]iscrimination by an employer based on age, race, sex, color, handicap, religious belief, national origin or political beliefs" (7 C.F.R. § 273.7(n)(3)(i)); "[w]ork demands or conditions that render continued employment unreasonable, such as working without being paid on schedule" (7 C.F.R. § 273.7(n)(3)(ii)); or, "[t]he degree of risk to health and safety is unreasonable" (7 C.F.R. § 273.7(i)(2)(i), incorporated by reference in 7 C.F.R. § 273.7(n)(3)(vi)). Finally, voluntary quits, even *without* good cause, by household members *other than* the "primary wage earner" will not result in any disqualification or ineligibility, even if the loss of income caused by the quit is the sole reason that the household's income falls below the eligibility guidelines. 7 C.F.R. § 273.7(n).

Strikers, in stark contrast to voluntary quitters, have *no* opportunity to escape disqualification by demonstrating good cause, render their *entire* household ineligible even if they were *not* the "primary wage earner," and, perhaps most dramatically, expose the household to a disqualification of *indeterminate* duration. Thus, those who temporarily withhold their labor "in concert" in response to unlawful discrimination, lack of pay as scheduled, unreasonable working conditions, or threats

to their health and safety are disqualified along with their households, while an individual quitter and his household remain eligible.

While not involving others precisely "similarly situated," a comparison of the striker provision and other statutory disqualifications also illustrates the irrationality and harshness of the striker provision. Individuals found guilty, after notice of hearing, of having "intentionally made a false or misleading statement" in connection with "using . . . [or] acquiring" food stamps are disqualified for various periods of time. 7 U.S.C. § 2015(b)(i); 7 C.F.R. § 273.16(b) (1987). First offenders are disqualified for six months, second offenders for one year, and third offenders permanently. In *none* of these instances, however, are other household members disqualified if they otherwise meet the financial eligibility criteria. *Id.* Individuals failing, "without good cause," to comply with the program's requirements to register for and accept suitable employment opportunities are disqualified for two months (or until compliance, whichever comes first). 7 U.S.C. § 2015(d)(1); 7 C.F.R. § 273.7(g)(1) as revised by 51 *Fed. Reg.* 47394 (December 31, 1986). Only if the individual refusing work opportunities without good cause is the "head of the household" is the eligibility of the entire household jeopardized. *Id.* Again, these provisions stand in stark contrast to the striker provision's absolute disqualification of the entire household for an indefinite duration without an opportunity to show good cause.

To the extent that the Secretary seeks to justify the striker provision as a rational response to the "voluntary" nature of the initial separation from employment caused by a strike, the Secretary bears the burden of showing that the classification provides similar treatment to those most similarly situated. Given the blatant dis-

crepancies between the treatment of strikers and voluntary quitters, the Secretary has failed to meet that burden.

Nor is the striker provision a rational effort to condition eligibility on a continuing willingness to work. As a practical matter, many employers cease operations during a strike and individual strikers therefore do not have the option of returning to work, even if "willing." Moreover, any such defense of the striker provision is misplaced because the statutory scheme here explicitly declines to require any potential recipient *except a striker* to accept work behind picket lines. 7 U.S.C. § 2015(d)(1)(A)(iii); § 2015(d)(3).

In addition, the striker provision adds absolutely nothing to the Food Stamp Act's legitimate efforts to condition eligibility on a willingness to accept work available for reasons other than a strike. All potential Food Stamp recipients are required to register for work. 7 C.F.R. § 273.7(a) (1987). In addition, "job ready" food stamp recipients must seek work. 7 C.F.R. § 273.7(f). Failure to comply with these requirements without good cause exposes the individual (or, in the case of the head of the household, the household) to a sanction of up to sixty days of ineligibility. 7 C.F.R. § 273.7(g). Prior to enactment of the striker provision, strikers — like all other recipients — were required to comply with these requirements. S. Rep. 97-139 at 61; H. R. Rep. 96-788 at 131.

Therefore, the striker provision contributes nothing to existing requirements tying food stamp eligibility to work aside from the obvious additional economic pressure to abandon the strike. As shown in the following section, this economic pressure neither contributes to an alleged "neutrality" on the part of the government nor furthers any other legitimate governmental goal.

C. Relying exclusively on *Ohio Board of Employment Services* v. *Hodory*, 431 U.S. 471 (1977), the Secretary attempts to defend the *per se* disqualification of any household containing a striker as a legitimate effort to "achieve a greater measure of neutrality in labor disputes." (Sec. Br. at 17). In *Hodory*, a state unemployment insurance statute which denied benefits to claimants laid off due to labor disputes elsewhere was upheld in the face of an equal protection challenge. Several differences between the food stamp program and unemployment insurance make *Hodory* wholly inapposite here.

As this Court has observed, in fashioning the unemployment compensation program, "the objective of Congress was to provide a substitute for wages lost during a period of unemployment not the fault of the employee." *California Dept. of Human Resources Development* v. *Java*, 402 U.S. 121, 130 (1971). The unemployment program, thus, was designed as a substitute source of income for individuals recently separated from employment for a limited list of reasons; the financial situation of the individual's household is completely irrelevant to eligibility.

The statutory classification upheld in *Hodory*, therefore, was reasonably related to the purpose of the statute. Since that statute was intended to replace income lost due to separation from employment, the statutory scheme necessarily categorizes the reasons for the separation from employment and concludes that some types of separations will trigger disqualification while others will not. In contrast, the food stamp program is not an employment-related program. Rather, benefits are generally conditioned upon a demonstrated inability of the household to purchase sufficient food.

With the striker provision, therefore, Congress has reached far afield from the statutory purpose of the food

stamp program and isolated one particular type of separation from employment and provided that — *regardless of need* — individuals separated for that particular reason are *per se* ineligible to participate in a program otherwise designed to evaluate eligibility primarily on the basis of financial need. In a statutory scheme designed to replace income lost due to some types of seprations from employment, "neutrality" may require that benefits be withheld from strikers, particularly where the employer would bear the cost of each striker's benefits. In a statutory scheme designed to assist low income households to purchase an adequate diet, however, a *per se* disqualification of low income households containing strikers does not promote "neutrality." Thus *Hodory*, upholding a classification integrally related to the purpose of the statute at issue there, can hardly be used to justify the importation of an extraneous factor into the eligibility criteria for an otherwise need-based program here.

In addition, great weight was given in *Hodory* to the financing of the unemployment insurance benefits by earmarked employer payroll tax contributions. As the Court noted, "[T]he employer's costs go up with every laid-off worker who is qualified to collect unemployment." 431 U.S. at 492. No such analogous funding situation exists in the case of food stamps, which are paid from general funding appropriations supported by the taxes of strikers and employers alike. 7 U.S.C. § 2027(a). Additionally, while unemployment insurance is payable to all laid off employees without regard to their financial need, food stamps are paid only to those striker households which meet the income, resource, and other eligibility requirements of the Food Stamp Act and regulations. In addition, food stamps are of lower monetary value than unemployment benefits. As a result, the payment of food stamps to otherwise eligible strikers has a dramatically reduced effect upon both

employers and strikers as compared to the case of unemployment insurance benefits.

Finally, and perhaps most importantly, there is nothing "neutral" in denying households — which, by definition, have insufficient income and resources to provide for themselves — otherwise need-based relief simply because their initial separation from employment was the result of a labor dispute. Food stamp benefits are provided only to those households whose income and resources are so minimal that a sufficiently nutritious diet cannot be obtained without assistance. As such, the food stamp program forms part of a complex backdrop of social legislation designed to protect individuals and families from the effects of poverty. With the notable exception of the disqualification of striker households, this backdrop is generally available to any individual or family able to demonstrate the requisite need.

Employers too, of course, are entitled to a wide variety of government-sponsored relief. For example, business losses — even those occasioned by strikes — are deductible from corporate income tax. Moreover, businesses facing financial hardship are entitled to file for protection from creditors under Chapter 11 of the Bankruptcy Code.[16]

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[16] These examples could be multiplied. Of particular note in this regard is the availability of the Targeted Jobs Credit provisions of the Internal Revenue Code. 26 U.S.C. § 51 *et seq*. Under these provisions, employers are allowed to receive a tax credit for an amount equal to forty percent of the wages of certain newly hired individuals, up to a maximum of $6,000 per employee. Interestingly, several employers have begun taking advantage of these tax credits by hiring individuals in the "targeted" categories to serve as strike replacements. (*See*, e.g., BNA Daily Labor Report, April 10, 1987, p. A-6.) Employers facing a strike, and seeking to hire strike replacements to enhance their bargaining position or break the union, are thus allowed to avail themselves of these significant tax credits despite their "non-neutral" impact.

The striker provision eliminates the availability of one aspect of this backdrop of need-based relief for households solely because a household member is out of work due to a strike. No similar disqualification from otherwise available benefits is made for the employer whose employees find it necessary to strike. To disqualify one participant in a dispute from eligibility for a need-based program — while allowing the other participant to continue to receive, and, in some instances increase, its eligibility for analogous programs — is not neutrality.

The logic of the earlier refusals by Congress to accept the neutrality argument of the Secretary is irrefutable. The House Agriculture Committee's 1977 Report explained its refusal to adopt language with the same effect as that in the present striker provision.

> The basic argument behind this proposal was that the government ought to be fair and equitable, and not to come in and help break a strike or win a strike for the union. That might be meaningful if the government were going to be perfectly equitable and make absolute neutrality the rule. But there is no law that says that a small business loan cannot be made to a company during the strike. Nor is there any law that says a government contract cannot be let to a company during a strike . . . . There is not a single expense to an employer flowing from a strike that cannot be written off.
>
> The real purpose of the amendment, . . . was not to restore some government neutrality allegedly lost because strikers are eligible for food stamps but, on the contrary, to use a denial of food stamps as a pressure on the worker — or more accurately to his family — to help break a strike, since everyone in the household, mother, father, daughter, son, even infant child — would have been denied participation as well as the worker himself.
>
> The amendment was an effort to increase the power of management over workers, using food as a weapon in collective bargaining.
>
> H.R. Rep. 95-464 at 129.

See also, H.R. Rep. 97-106(I) at 142; H.R. Rep. 96-788 at 132-133; 127 *Cong. Rec.* S6136-6137 (June 11, 1981) (Remarks of Sen. Levin).

In short, *Hodory* relied upon the structure of the statute in question, which paid unemployment benefits to employees locked-out by an employer, but denied benefits to employees separated as a result of a strike. 431 U.S. at 491. The Court concluded that this sort of "rough justice" was "far from irrational." *Id.* The same cannot be said for the striker provision's treatment of strikers and their households, which denies benefits to persons in need of food stamps for reasons wholly unrelated to the purposes of the Act and fails to further any of the rationales articulated in its support.

3. The striker provision impermissibly penalizes all members of a striker's household — who, by definition, are incapable of providing sufficient food for themselves — solely because of the conduct of a single household member. Even if Congress *may* have an interest in tailoring the food stamp program to exclude strikers, the exclusion of other household members is fundamentally unfair to children, spouses, grandchildren and other "innocent" parties who are deprived of needed food stamps through the striker provision. (J.S. 13a). One such example was furnished here by the case of appellee Johnie B. Blake, whose three young grandsons were

deprived of food stamps solely due to her status as a striker after their placement in her home by a state agency. (J.A. 55).

In *Plyler* v. *Doe*, 457 U.S. 202, 220 (1982), the Court stated:

> Even if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice.

Weighing the importance of public education and the lasting effects resulting from its deprivation, the Court in *Plyler* next concluded that the state law denying educational funds to the children of undocumented aliens "can hardly be considered rational unless it furthers some substantial goal of the State." *Id.*, at 224. The goal asserted was the preservation of scarce state educational resources. This bare assertion was insufficient to justify the challenged statute, and, in any event, the exclusion of undocumented children was found an ineffective means of preserving state resources. *Id.*, 227-230.

The Secretary contends that the exclusion of striker households, as opposed to the disqualification of only strikers, is necessary for administrative convenience since the food stamp program frequently utilizes the household concept. However, as the district court found, the food stamp agency necessarily has knowledge of the household's composition and the striker's presence in the household. Therefore, it is administratively feasible for the Secretary to pay food stamps at a reduced level with the striker in the household, as it already does if the striker leaves the household. (J.S. 14a-15a). [17]

[17] In any event, administrative feasibility cannot furnish the basis, in and of itself, for a classification where other reasonable means of accomplishing the end exist. *See Vlandis* v. *Kline*, 412 U.S. 441, 451 (1973); *Griffin* v. *Yeager*, 384 U.S. 305, 309 (1966).

The administrative feasibility of disqualifying only strikers and not their households is further demonstrated by the fact that in other situations the Act penalizes an individual, rather than the entire household, for sanctioned conduct. In the case of sanctions for intentional program violations (fraud), households containing ineligible aliens, persons who fail or refuse to provide a social security number, and individuals failing to comply with workfare requirements, the sanctioned individual is treated as a "nonhousehold member." 7 C.F.R. § 273.1(b)(2), § 273.11(c) (1987). Benefit levels are then computed without taking the sanctioned individual into account, with the remaining household members receiving the reduced benefit. *Id.* The voluntary quit disqualification, to take a different example, only applies if the individual leaving work is the "head of the household," normally the household's "primary wage earner." 7 C.F.R. § 273.1(d)(2); § 273.7(n) (1987), as amended by 51 *Fed. Reg.* at 47395 (December 31, 1986). (J.S. 15a). [18] Congress clearly was not administratively required to exclude strikers' households when it sought to exclude strikers from food stamps.

In this case, the interest at issue is governmental food assistance. Certainly, individual household members have an important interest in the timely receipt of food stamps. The activities of strikers, as a rule, are lawful and unquestionably more protected than those of the undocumented workers in *Plyler*, or the "hippies" in *Moreno*. There is no administrative necessity, nor

[18] In the case of non-compliance with the food stamp program's work rules, the entire household is sanctioned for two months (or until compliance occurs) only in the case of the non-compliance of the "head of the household." 7 C.F.R. § 273.7(g)(1) as revised by 51 *Fed. Reg.* 47394 (December 31, 1986). In the case of non-compliance with work requirements by other household members, the remainder of the household's benefits are computed without taking the non-compliant member into account. *Id.*

rational basis, for the harsh treatment of striker households which occurs as a result of the striker provision. For this reason, the exclusion of strikers' households fails to further a legitimate governmental interest and is unconstitutional.

4. This Court has examined equal protection/due process challenges to Congressional amendments in the food stamp program on four occasions. The Court has twice approved Congressional classifications which reasonably adjusted food stamp eligibility on the basis of need. In contrast, the Court has disapproved two classifications disqualifying otherwise needy recipients which were not reasonably related to the purposes of the food stamp program or a legitimate governmental purpose.

In *Department of Agriculture* v. *Moreno*, 413 U.S. 528 (1973), this Court applied the rational basis standard to a federal food stamp amendment which rendered ineligible any household containing an individual unrelated to any other member of the household. The Court in *Moreno* first noted that the amendment was "clearly irrelevant" to the purposes of the food stamp program, i.e., the provision of food assistance to low income households. 413 U.S. at 533-534. Looking to other possible justifications, the Court noted a reference in the legislative history indicating Congressional concern about "hippies" receiving food stamps. The Court rejected this justification, stating that "a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *Id.*, 534 (emphasis in original). The Court also rejected the prevention of fraud as a rational basis for the amendment, given the existing anti-fraud provisions in the program and the lack of any "practical effect" of the amendment upon the prevention of fraud. *Id.*, 536-537. As a result, *Moreno* struck down the amendment as devoid of any rational basis.

Similarly, in *Department of Agriculture* v. *Murry*, 413 U.S. 508 (1973), a companion case to *Moreno*, the Court struck down a food stamp amendment which disqualified households from food stamps if a household member had been claimed as a tax dependent by non-household taxpayers who were themselves ineligible for food stamps. Again, the challenged statute prevented otherwise needy households from obtaining food stamps. The Court determined that the amendment was not a rational measure of the need of a household for food stamps and was an impermissible irrebuttable presumption.

Lyng v. *Castillo*, No. 85-250, Slip Opinion (June 27, 1986), a more recent food stamp case, approved an amended definition of the statutory term "household" for purposes of calculating financial resources and income. By its own terms, *Castillo* is not controlling here. In *Castillo*, Congress selected a household definition providing that related individuals living together were required to apply for food stamps as a single household. Slip Op. at 1 n. 1. As a result, all related individuals in a household had their income and resources considered together in relation to their food stamp eligibility, disallowing a common practice of excluding some household members who had income. Slip Op. at 1-2. In *Castillo*, therefore, the classification related to the purposes of the act, i.e., the manner in which income and resources of persons sharing a home would be assessed in determining program eligibility.[19]

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[19] Similarly, this Court approved a reasonable definition of income for food stamp purposes which disallowed a specific deduction for travel allowances in *Knebel* v. *Hein*, 429 U.S. 288 (1977). This distinction is further illustrated by a case involving Aid to Families with Dependent Children (AFDC) decided last Term. *Bowen* v. *Gilliard*, No. 86-509, Slip Opinion (June 25, 1987). In *Gilliard*, this Court upheld an amendment to AFDC eligibility which — like that at issue in *Castillo* — was reasonably related to the task of assessing financial need.

In this case, as in *Moreno* and *Murry*, Congress has conditioned food stamp eligibility upon extraneous factors unrelated to income, resources, or the purposes of the Food Stamp Act.[20] Thus, the striker provision's disqualification of the entire striker household has an effect here similar to the statute in *Moreno*. This contrasts with the statute in *Castillo* which did not completely disqualify households without regard to need.[21]

The district court buttressed its conclusion that *Moreno*, rather than *Castillo*, was applicable here by analogizing the historically harsh treatment of strikers to this Court's discussion of the reference to hippies in the legislative history of the 1970 statute at issue in *Moreno*. (J.S. 12a-13a). The district court's discussion of the historical treatment of strikers was also prompted by this Court's observation in *Castillo* that families have not been "[a]s a historical matter . . . subjected to discrimination . . . ." Slip Op. at 3. The district court's analysis of the historical treatment of strikers thus led to its conclusion that "[t]his history makes this case more nearly resemble *Moreno* than *Lyng* [v. *Castillo*]." (J.S. 13a).

The district court did not hold "that labor unions . . . and striking workers . . . warrant special constitutional protection." (Sec. Br. at 26). The Secretary's reinterpretation of this portion of the district court's opinion is part and parcel of its attempt to persuade this Court that the district court erred in the legal standards it applied in declaring the striker provision un-

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[20] As Justice Powell has observed, the "importation of eligibility criteria from one statute to another creates significant risks that irrational distinctions will be made between equally needy people." *Schweiker* v. *Wilson*, 450 U.S. 221, 245 (1981) (dissenting).

[21] The situation here also contrasts with this Court's conclusion in *Castillo* that the challenged statute did not interfere with family living arrangements. Slip Op. at 4. The court below found such interference here. (J.S. 11a, 18a n. 1, 45a).

constitutional. The appellees do not seek special constitutional consideration from this Court, just as they did not do so below.[22]

Considering the striker provision in the context of the existing statutory scheme, the classification employed by Congress to exclude strikers from food stamps is arbitrary and irrational. As we have shown, the striker provision is unrelated to the purposes of the Act, does not reasonably classify low income persons according to need, and does not further any of the purposes raised in its defense. Therefore, the district court's judgment should be affirmed.

II.

THE STRIKER PROVISION IMPERMISSIBLY BURDENS THE EXERCISE OF FIRST AMENDMENT RIGHTS.

1. The First Amendment protects the associational rights of unions and their members to form unions and to engage in picketing, boycotting, leafletting, and other activities which enhance union and worker in-

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[22] The Secretary also misleadingly refers to two lower court decisions as extending the *Hodory* rationale to other federal entitlement programs. In *Russo* v. *Kirby*, 453 F.2d 548 (2d Cir. 1971), while the court, in *dicta*, characterized plaintiff's First Amendment claims there as "frivolous," its one-sentence analysis provides little support for the Secretary here. This is particularly true since the plaintiffs in *Russo* eventually prevailed in state court and the benefits at issue were reinstated. *See, Lescaris* v. *Wyman*, 38 A.D.2d. 163, 328 N.Y. Supp. 2d 2389 (App. Div. 1972), *aff'd.*, 31 N.Y.2d. 386, 340 N.Y. Supp. 2d 397, 292 N.E.2d 667 (Ct. App. 1972), *cert. denied*, 414 U.S. 832 (1973). In addition, a three-judge court in *Francis* v. *Davidson*, 340 F.Supp. 351 (D. Md. 1972) (three-judge court), *aff'd. mem.* 409 U.S. 904 (1972), found that Maryland's denial of AFDC benefits to strikers violated federal AFDC regulations. *Id.*, 368. The court there also held that plaintiff's constitutional claims were not frivolous, requiring the convening of a three-judge district court. Although the court eventually noted, in *dicta*, that it disagreed with plaintiff's constitutional claims, this holding was unnecessary to the result reached in the case. *Id.* at 357, 363.

terests.[23] *Thornhill* v. *Alabama*, 310 U.S. 88, 103 (1940); *Thomas* v. *Collins*, 323 U.S. 516, 532 (1945); *Allee* v. *Medrano*, 416 U.S. 802 (1974). In these decisions, and many others, this Court has long recognized the necessity of protecting free association as well as free speech. Cf. *NAACP* v. *Alabama*, 357 U.S. 449, 460 (1958).

"The established elements of speech, assembly, association, and petition, 'though not identical, are inseparable'." *NAACP* v. *Clairborne Hardware Co.*, 458 U.S. 886, 911 (1982), quoting *Thomas* v. *Collins*, at 530. In this case, the individual appellee's associational rights to join a union and to advance his or her cause are closely linked to, though not identical with, the right to strike and exercise other forms of concerted economic coercion against employers. The district court recognized that the thrust of this case ". . . is not simply (that) a union's right to strike . . . may be threatened by the striker disqualification . . . . Quite apart from any claimed right to strike, the right to join a union, and of a union to promote its lawful interests, is constitutionally protected." (J.S. 37a). In addition, the appellees' rights to maintain family and household relationships of their own choice are involved. This Court has termed these types of associational rights as "expressive association" and "intimate association." *Roberts* v. *United States Jaycees*, 468 U.S. 609, 618 (1984).

The striker provision inevitably affects the associational rights of unions and their members by depriving strikers — solely by virtue of their concerted activity — of food assistance to which they are otherwise entitled. A strike cannot occur as an individual activity. It is concerted

[23] While these union activities have been given significant protection under the First Amendment, the courts have been more circumspect regarding a right to strike. *International Union, UAW* v. *Wisconsin Employment Relations Board*, 336 U.S. 245, 259 (1949).

activity by definition, and it is undertaken to further the goals of union members associated together as an organization.

The involvement of associational freedoms in this case is best illustrated by the punitive, discriminatory treatment of strikers as compared to those who voluntarily quit work as individuals. An individual can quit with good cause due to discrimination, unreasonable working conditions, or an unreasonable risk to health and safety. 7 C.F.R. § 273.7(n)(3)(i), § 273.7(n)(3)(ii), § 273.7(i)(2)(i) (1987). However, if the individual ceases work in association with his or her fellow workers in a collective response to identical conditions, the striker provision subjects his entire household to a disqualification from food stamps.

2. The striker provision effectively penalizes appellees' associational rights by imposing a *per se* disqualification upon strikers and their households. The Secretary made clear, in a response pleading filed to questions from the district court, that the effect of the striker provision is to force an impermissible choice upon a striker. That is, in order to obtain eligibility for food stamps, "someone on strike can either return to work or quit his job. Both of these actions demonstrate that the individual is no longer on strike." (J.A. 2). Regardless of whether a striker returns to work or quits his job, the striker's ties with fellow strikers and his or her union are seriously impacted. Thus, it is clear that the striker provision impermissibly infringes upon the associational rights of strikers and their unions.

By conditioning eligibility for food stamps on the willingness of an individual to break ranks with fellow union members, the striker provision punishes individuals and their families for the exercise of the statutorily protected right to strike and its related consti-

tutionally protected rights. This Court has long held that such a denial of benefits is unlawful.

> [T]his Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely . . . . For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited.
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> *Perry* v. *Sinderman*, 408 U.S. 593, 597 (1972) (text omitted).

In *Sherbert* v. *Verner*, 374 U.S. 398 (1963), the Court, under the free exercise of religion clause of the First Amendment, invalidated an application of state unemployment law which denied unemployment benefits to an individual whose religious beliefs kept her from working on Saturday. The Court determined that the denial of unemployment benefits imposed a burden upon the claimant's free exercise of religion.

> Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work on the other hand.
>
> *Id.*, 404.

The *Sherbert* Court concluded that the denial of unemployment benefits "effectively penalizes" the claimant's exercise of religion. *Id.*, 406.[24]

The appellees need not show that the striker provision "prohibits union members from expressing their views," or "directly interferes" with their union associational activity. (Sec. Br. at 22-23). "[T]he Constitution's protection is not limited to direct interference with fundamental rights." *Healy* v. *James*, 408 U.S. 169, 183 (1972). "Freedoms . . . are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *Bates* v. *City of Little Rock*, 361 U.S. 516, 523 (1960). *See also Thomas* v. *Review Board*, 450 U.S. 717-718; *Speiser* v. *Randall*, 357 U.S. 513, 518 (1958).

As the Secretary admits, under the terms of the striker provision, a striker is forced to choose between food stamp eligibility and solidarity with his or her fellow workers. Some strikers' inability to bear the added economic strain caused by the denial of food stamps has resulted in their choosing to abandon a strike and their union memberships. Forcing such a choice upon an individual demonstrates that the striker provision unconstitutionally burdens the appellees' associational rights.

The Secretary conceded below that the striker provision also threatens the appellees' formal union member-

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[24] The Court has reaffirmed the vitality of the *Sherbert* analysis in *Thomas* v. *Review Board*, 450 U.S. 707 (1981) and *Hobbie* v. *Unemployment Appeals Commission*, No. 85-993, Slip Opinion (February 25, 1987). Contrary to the Secretary's suggestion, Br. at 25, this Court has not restricted its analysis and holding in *Sherbert* v. *Verner* to the religious freedom context. *See*, e.g. *Elrod* v. *Burns*, 427 U.S. 347, 361-363 (1976) (plurality); *Perry* v. *Sinderman*, 408 U.S. at 597; *Keyishian* v. *Board of Regents*, 385 U.S. 589, 606 (1967). Each of these cases, citing *Sherbert*, found that a burden on speech or associational rights was unconstitutional. *See also*, *Shapiro* v. *Thompson*, 394 U.S. at 634.

ship if they would choose to abandon the strike by either returning to work or quitting their job in order to obtain food stamps. Defendant's Response to Question Nos. 3 and 4 at 3-4, quoted at J.S. 28a. This threat became a reality in at least two cases. (J.A. 21, 49, 79). In short, the striker provision constitutes a "significant encroachment" upon appellees' exercise of associational freedoms. *Kusper* v. *Pontikes*, 414 U.S. 51, 57-59 (1973).

3. Once a conflict with First Amendment rights is established, the conflicting provision must fall unless a substantial governmental interest, which cannot be more narrowly accommodated, is furthered by the provision. *Roberts*, 468 U.S. at 623; *Thomas* v. *Review Board*, 450 U.S. at 718; *Kusper* v. *Pontikes*, 414 U.S. at 58; *NAACP* v. *Button*, 371 U.S. 415, 433 (1963); *Bates* v. *Little Rock*, 361 U.S. at 525.

This case is one in which both the "expressive" and "intimate" forms of associational freedoms are implicated. The Secretary has not attempted to justify the burdens placed on these freedoms by the striker provision with any governmental interest which can properly be characterized as "substantial." In fact, the justifications offered by the Secretary to defend against the appellees' equal protection/due process claim are similar to the "ordinary" governmental interests rejected on other occasions by this Court. *Kusper* v. *Pontikes*, 414 U.S. at 58-61; *Shapiro* v. *Thompson*, 394 U.S. at 633; *Bates* v. *Little Rock*, 361 U.S. at 525-527. *See also, Rotary International* v. *Rotary Club of Duarte*, No. 86-421, Slip Opinion (May 4, 1987).

The first justification offered by the Secretary, that disqualifying striker households saves money, without more, furnishes no substantial justification for the striker provision. "The saving of welfare costs cannot justify an otherwise invidious classification." *Shapiro* v. *Thompson*, 394 U.S. at 633; *see also, Graham* v. *Richardson*, 403 U.S. at

374-376. The government may not constitutionally save money through a penalty upon the exercise of First Amendment rights. *Thomas* v. *Review Board*, 450 U.S. at 718-719; *Sherbert* v. *Verner*, 374 U.S. at 407.

The appellees previously demonstrated that the Secretary's remaining proffered justifications — tying food stamp eligibility to a willingness to work and governmental neutrality in labor disputes — are not, in fact, advanced by the striker provision. However, even if accepted at face value, the broad, unqualified denial of food stamps visited upon striker households by the striker provision is hardly a result of the sort of provision which "could not more narrowly be accommodated." As appellees have shown, in many other cases the food stamp program sanctions an individual, rather than an entire household, for improper conduct. This includes those who are found to have committed food stamp fraud. Even in the analogous case of individuals who voluntarily quit work or refuse work without good cause, the entire household is sanctioned only when the head of the household is determined to have engaged in the improper act without good cause. *See* discussion at 24-25, *supra*. Assuming that Congress could validly disqualify strikers as a means to its goals, the accompanying denials of food stamps to household members are certainly not "narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms." *Schaumberg* v. *Citizens for a Better Environment*, 444 U.S. 620, 637 (1980). Furthermore, the indeterminate length of the striker disqualification, as opposed to other food stamp disqualifications, which are for a limited number of days or months, is not carefully tailored to avoid unnecessary harm to strikers and their households.

In this case, the appellees have shown that the striker provision was not a carefully tailored effort and that it lacks any substantial justification for the burden it places upon the appellees' rights of free association and speech. Although the striker provision does not directly prevent the appellees from striking, its denial of food stamps impermissibly burdens their exercise of First Amendment rights.

4. The Secretary argues that the striker provision does not prohibit union members from expressing their views, but rather "it simply refuses to fund the decision to strike." (Sec. Br. at 13). Citing *Harris* v. *McRae*, 448 U.S. 297 (1980), and other cases, the Secretary falsely portrays this case as one which seeks to compel federal funding for strikes through the payment of food stamps. Rather, Congress, having established a food stamp program, is prohibited by the First Amendment from effectively penalizing the appellees' exercise of protected rights.

The Secretary's attempted extension of *Harris* v. *McRae* and *Maher* v. *Roe*, 432 U.S. 464 (1977), to this case overlooks a critical element in each of those cases: the nature of the constitutional interests involved. Both *Maher* and *Harris* relied upon this Court's determination that the right to choose an abortion established in *Roe* v. *Wade*, 410 U.S. 113 (1973), was tempered by "the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds." *Maher*, 432 U.S. at 474, quoted by *Harris* at 448 U.S. 314. *Maher* and *Harris* also explicitly recognized that the doctrine of *Roe* v. *Wade* "protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy," *Harris*, 448 U.S. at 314, quoting *Maher* at 473-474, and did not establish an "unqualified right to an abortion." *Maher*, 432 U.S. at 473; *Harris*, 448 U.S. at 313-314.

The constitutional freedoms at issue here, unlike the right to choose an abortion, are not lightly subjected to regulation. *Citizens Against Rent Control* v. *City of Berkeley*, 454 U.S. 290, 294 (1981). Rather, the appellees' rights to association — with their fellow strikers, their union, and their households — are at the very core of the First Amendment. Therefore, this is a situation — unlike *Maher* or *Harris* — in which there is a "constitutionally imposed 'governmental obligation of neutrality'." *Maher*, 432 U.S. 464 n. 8, quoting *Sherbert*, 374 U.S. at 409.[25] Unlike the situation in *Maher* and *Harris*, this case arises in the First Amendment context. While the government need not remain neutral in the decision between childbirth and abortion, "it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas." *F.C.C.* v. *Pacifica Foundation*, 438 U.S. 726, 745-746 (1978) (plurality).[26] While the Constitution admittedly does not command government funding of constitutional rights, it does not

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[25] The Secretary seeks to limit *Sherbert* to what is termed the "unique context" of the religion clauses of the First Amendment. (Sec. Br. at 25). While there are undoubtedly distinctions between the various categories of First Amendment rights, the distinction raised by the Secretary is not based upon this Court's decisions or the text of the First Amendment — which do not raise religious freedoms uniquely above all other protected rights. Specifically, in regard to the associational rights implicated here, Justice Black wrote:

> [W]e believe . . . that First Amendment rights are beyond abridgment either by legislation that directly restrains their exercise or by suppression or impairment . . . . One of those rights, freedom of assembly, includes of course freedom of association; and *it is entitled to no less protection than any other First Amendment right* . . . .
>
> *Bates* v. *Little Rock*, 361 U.S. at 528 (concurring) (emphasis added) (text and citations omitted).

[26] *See also, Planned Parenthood Ass'n. of Chicago* v. *Kempiners*, 700 F.2d 1115, 1123-1124 (7th Cir. 1982) (separate opinion of Judge Cudahy); *Planned Parenthood* v. *State of Arizona*, 789 F.2d 1348, 1350-1351 (9th Cir. 1986), *aff'd.*, — U.S. —, No. 86-369 (November 3, 1986).

countenance governmental denials of benefits which burden or penalize the exercise of protected rights.

A comparison of *Maher* and *Harris* to *Sherbert* demonstrates that this distinction between the right to abortion (which is subject to all but "unduly burdensome interference") and the rights to freedom of speech, association, and religion (for which "any incidental burden . . . [must] be justified by a 'compelling state interest'," *Sherbert*, 374 U.S. at 403) is a principal reason for the differing results in those cases. In the instant case, the appellees seek food stamps for which they are otherwise financially eligible, but for their status as strikers or members of a striker's household. This status necessarily involves a striker's assertion of constitutionally protected associational rights.

In contrast, the denial of Medicaid funding for an abortion to the plaintiffs in *Harris* was not a broad denial of benefits, as in *Sherbert*. In *Harris*, individuals were not disqualified from benefits altogether because they had chosen to exercise a constitutionally protected right. In fact, the *Harris* decision recognized this distinction. The Court noted:

> A substantial constitutional question would arise if Congress had attempted to withhold all Medicaid benefits from an otherwise eligible candidate simply because that candidate had exercised her constitutionally protected freedom to terminate her pregnancy by abortion. This would be analogous to *Sherbert* v. *Verner* . . . where this Court held that a State may not . . . withhold *all* unemployment compensation benefits from a claimant who would otherwise be eligible for such benefits but for the fact that she is unwilling to work one day per week on her Sabbath. But the Hyde Amendment [which denied federal

> funding for most abortions], unlike the statute at issue in *Sherbert*, does not provide for such a broad disqualification from receipt of public benefits. Rather, the Hyde Amendment, like the Connecticut welfare provision at issue in *Maher*, represents simply a refusal to subsidize certain protected conduct. A refusal to fund, without more, cannot be equated with the imposition of a "penalty" on that activity.
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> 448 U.S. at 317 n. 19 (emphasis in original) (text and citation omitted).

See also, Maher v. *Roe*, 432 U.S. at 474 n. 8 (1977).

This distinction is critical for purposes of constitutional analysis. While the government is under no constitutional obligation to operate a food stamp program, it must operate within constitutional constraints once a program is established. *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982); *Vitek* v. *Jones*, 445 U.S. 480, 488-489 (1980); *Maher* v. *Roe*, 432 U.S. 464, 469-470.

This Court's opinion in *Sherbert* further clarifies the distinction made in *Harris*. In characterizing its holding in *Speiser* v. *Randall, supra*, the Court's opinion in *Sherbert* explained:

> In *Speiser* v. *Randall* . . . we held that *the imposition of . . . a condition upon even a gratuitous benefit inevitably deterred or discouraged the exercise of First Amendment rights of expression*. . . .
>
> *Id.*, 405. (emphasis added) (citation omitted).

The First Amendment rights at issue here are obviously more analogous to those at issue in *Sherbert* than to those at issue in *Maher* and *Harris*. Given the constitutional interests at stake, and the substantial distinctions

between this case and the abortion cases, the Secretary's "funding argument" should be rejected by this Court.[27]

5. The district court found a serious invasion of the appellees' rights in the striker provision's demonstrated interference with family life. (J.S. 13a-15a). The record establishes that changes in child custody and marital status have occurred, in part, due to the added economic hardship caused by the denial of food stamps. (J.A. 4, 30, 47).

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[27] In *Eaton* v. *Lyng*, N.D. Iowa No. C87-4073 (June 29, 1987), the district court accepted the Secretary's "funding argument." Slip Op., 9-12. Noting the plaintiffs' arguments concerning the comparatively harsh treatment of strikers, the district court found ". . . nothing in the First Amendment jurisprudence which prevents Congress from discriminating against persons who are unemployed due to collective action rather than discrete individual acts." Slip Op., 12-13. To the contrary, in *Citizens Against Rent Control* v. *City of Berkeley*, 454 U.S. at 296, the Court stated:

> There are, of course, some activities, legal if engaged in by one, yet illegal if performed in concert with others, but political expression is not one of them.

This Court went on to strike down a political spending limit imposed on groups, but not on individuals. *Eaton* thus missed the associational essence of the constitutional claim here.

The Secretary cites *Ledesma* v. *Block*, W.D. Mich. No. G82-94 (August 26, 1985), a case which followed the approach he advocates here. (Sec. Br. at 20). In *Ledesma*, the district court ruled that the striker provision did not violate the First Amendment rights of strikers and their households or equal protection. With due respect to these courts, their reasoning on this point suffers from the same faults illustrated here by the Secretary's arguments. In short, the courts' focus on the "funding" theory caused them to shortchange the striker provision's impact on strikers' associational rights. The record here is replete with evidence of such impact.

United Steelworkers v. *Block*, 578 F.Supp. 1417 (D.S.D. 1982), cited as an "alternative holding" by the Secretary (Sec. Br. at 20), was *not* a holding on the constitutionality of § 2015(d)(3). The district court's passing reference to the constitutional issue in that case was *dicta*. This was recognized in a related case by the Eighth Circuit Court of Appeals. *United Steelworkers* v. *Johnson*, 799 F.2d 402, 404 (8th Cir. 1986).

Strong interests are implicated by these family and household ties; ties that are part and parcel of what *Roberts* termed "intimate association." 468 U.S. at 618. Numerous cases have noted this "Court's historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest . . . ." *Santosky* v. *Kramer*, 455 U.S. 745, 753 (1982) (and cases cited therein). *See*, *Roberts* at 468 U.S. at 618-619 (and cases cited); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965); *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972). *See also* Justice Douglas' concurring opinion in *Moreno*, 413 U.S. at 538-547.

Since food stamps are based upon need, their denial to the households of strikers who meet the program's financial standards unquestionably has a greater effect upon those otherwise eligible strikers than the denial of unemployment insurance involved in *Sherbert* and *Thomas*. But those households who are most needy and least able to depend upon other resources are precisely those against whom the striker provision operates with the greatest force. These strikers are the ones who must face the dilemma posed by the striker provision: to abandon the strike by quitting, by returning to work at the struck plant, or to adjust their households to accommodate the increased hardship caused by the denial of food stamps.

Whether expressed as a due process, privacy, or First Amendment right, or as a matter for scrutiny under the equal protection clause, "[a] host of cases . . . have consistently acknowledged a 'private realm of family life which the state cannot enter'." *Moore* v. *City of East Cleveland*, 431 U.S. 494, 499 (1977), quoting *Prince* v. *Massachusetts*, 321 U.S. 158, 166 (1944) (citation omitted). Such an intrusion must be substantially justified, and the Secretary has failed to do so here.

CONCLUSION

For these reasons, the decision of the district court should be affirmed.

Respectfully submitted,

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July 31, 1987

REPLY

BRIEF

No. 86-1471

In the Supreme Court of the United States

OCTOBER TERM, 1987

RICHARD A. LYNG, SECRETARY OF AGRICULTURE,
APPELLANT

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE
AND AGRICULTURAL IMPLEMENT WORKERS OF
AMERICA, UAW, ET AL.

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA*

REPLY BRIEF FOR THE APPELLANT

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE APPELLANT

In our opening brief, we demonstrated that Section 2015(d)(3) of the Food Stamp Act of 1964 (7 U.S.C.) is rationally related to three legitimate legislative objectives: (1) reducing the costs of the Food Stamp program, as part of an integrated effort to trim the federal deficit; (2) tying the receipt of food stamps to the ability and willingness to work, thereby channeling scarce resources to those least able to provide the means for self-support; and (3) achieving a greater measure of government neutrality in labor disputes. In response, appellees acknowledge (Br. 18-19 n.12) that rationality is the benchmark but, applying that standard (*id.* at 17-37), find the statute wanting. Moreover, while appellees agree (*id.* at 44) that Section 2015(d)(3) "does not directly prevent" them from exercising First Amendment rights, they assert that the statute "effectively penalizes [their] associational rights" (Br. 39) and "impermissibly burdens" their rights of free expression (*id.* at 44).

A. Section 2015(d)(3) has a Rational Basis

1. Appellees' quarrel with Section 2015(d)(3) may stem, in some measure, from their apparent misapprehension about its actual meaning and application. At every turn, appellees describe the statute as if it disqualified households containing strikers from any and all participation in the Food Stamp program. As appellees put it, Section 2015(d)(3) imposes a "*per se* disqualification of strikers and their households from food stamps" (Br. 1) and "prohibits the participation in the food stamp program of an entire household which contains a member on strike" (*id.* at 6-7). See also *id.* at 14, 20; ACLU Amicus Br. 2, 6. Section 2015(d)(3) does not, however, *disqualify* households containing strikers from the Food Stamp program. A household that is eligible to receive food stamps prior to a strike does not lose its eligibility once the strike begins; it simply cannot receive additional coupons on account of the loss of income occasioned by the strike itself. And a household that includes a person who goes on strike is not permanently precluded from receiving food stamps; the preclusion lasts only as long as that person is on strike.

2. Appellees find none of the three purposes served by Section 2015(d)(3) sufficient to give the statute a rational grounding. They first dispute the rationality of Section 2015(d)(3) as a cost-cutting measure. In appellees' view, "a legislative classification directing welfare benefits cannot be justified by a mere showing that the classification will reduce expenditures" (Br. 19). But Section 2015(d)(3) was not designed "mere[ly]" to achieve a savings in revenue. The statute sought to save money, to be sure, but only in a manner that channelled the remaining, limited funds to persons whom Congress believed were generally less able than strikers to provide the means of self-support.

There is nothing irrational about that goal, as this Court confirmed last Term in *Bowen* v. *Gilliard*, No. 86-509 (June 25, 1987). In the *Gilliard* case, decided shortly after

our opening brief was filed, plaintiffs challenged a statute that required households filing for AFDC benefits to treat as members of the household all children living in the same home, including those children for whom support payments were being received. In many cases, the net result of that provision—when coupled with a second provision requiring that all but $50 of the support payment be assigned to the State—was sharply to reduce the total funds available to the household. The Court held that the statute had a rational purpose, in that it "unquestionably serves Congress' goal of decreasing federal expenditures" (slip op. 11). And while the statute "severely impact[ed] some families," that did "not alter the fact that the entire program has resulted in saving huge sums of money" (*ibid.*). The Court found that the interest in savings was "also supported by the Government's separate interest in distributing benefits among competing needy families in a fair way." In particular, "[g]iven its perceived need to make cuts in the AFDC budget, Congress obviously sought to identify a group that would suffer less than others as a result of a reduction in benefits." *Id.* at 11-12.[1]

As in the *Gilliard* case, Congress resolved to make sizeable budget cuts in the Food Stamp program (among others), and it structured those cuts so as to channel available resources to those persons whom it thought were least able to support themselves. Appellees dispute that

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[1] Appellees refer to *Gilliard* only in passing (see Br. 35 n.19), purporting to distinguish the case because there, unlike here, Congress enacted a statute that was "reasonably related to the task of assessing financial need." But in enacting Section 2015(d)(3), Congress made a similiar "assess[ment] [of] financial need": it concluded—reasonably, we believe—that households containing a striking member are generally better off than households whose members have no job prospects at all.

judgment on various empirical grounds.[2] They assert (Br. 21), for example, that households containing strikers are generally as needy as households that do not contain strikers. But Congress thought otherwise, concluding that strikers at least have a job waiting for them which, for economic or other reasons, they have chosen not to perform. Appellees also dispute (*id.* at 22) "[t]he unstated but implicit premise in this argument * * * that strikers have voluntarily left work and can return * * * at any time during a strike." That premise is mistaken, they argue, because "in many instances" a struck employer will close his plant; "[i]n an additional minority of situations, the employer will permanently replace its striking workers";[3] and not every striker will have voted in favor of the strike (*id.* at 22-23). It is plain, however, that "[i]n determining how best to allocate limited funds among the extremely large class of needy families" eligible for food stamps, "Congress is entitled to rely on [the] class-wide presumption" that striking workers have made a significantly voluntary decision to begin a strike and remain on strike. *Bowen* v. *Gilliard*, slip op. 13. See also *Baker* v. *General Motors Corp.*, No. 85-117 (July 2, 1986), slip op. 16.

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[2] As the Court has explained in rejecting a similar claim in an equal protection case, the question is not "which party has shown that a disputed historical fact is more likely than not to be true." Rather, "those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." *Vance* v. *Bradley*, 440 U.S. 93, 110-111 (1979).

[3] As the district court observed (J.S. App. 47a n.4) and as appellees acknowledge (Br. 11 n.10), it is the Secretary's policy *not* to make households ineligible for food stamps where strikers have been permanently replaced by their employers. Section 2015(d)(3) is not unconstitutional simply because that policy may not have been followed in certain cases. See *Bowen* v. *Gilliard*, slip op. 11 (rationality of AFDC amendments is not undermined by "evidence that a few non-custodial parents were willing to violate the law by not making court-ordered support payments").

3. Appellees also contend (Br. 23-25) that Section 2015(d)(3) is an irrational way to tie the receipt of food stamps to the ability and willingness to work, pointing to the somewhat more favorable treatment of voluntary quitters under the Food Stamp Act. That argument is flawed in two respects.[4]

First, Congress could well have believed that in some respects a voluntary quitter is worse off than a person who is on strike, and accordingly should receive more generous treatment under the Food Stamp Act. As one court has observed (*Ledesma* v. *Block*, No. G82-94 (W.D. Mich. Aug. 26, 1985), slip op. 9, aff'd, 825 F.2d 1046 (6th Cir. 1987)):

> [T]he striker's separation from employment is temporary rather than permanent. Strikers can return to work simply by terminating the strike. A voluntary quit generally cannot unilaterally decide to return to his previous employment. Therefore, after a statutory period of 90 days, the government no longer considers one who quit his job to be, quote, "voluntarily unemployed". The same just cannot be said for an individual on strike.[5]

Second, appellees overlook the fact that Congress sought not only to tie food stamps to the willingness to work, but to do so in a way that promoted governmental neutrality in labor disputes. Congress could well have con-

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[4] Appellees also find Section 2015(d)(3) discriminatory because it requires strikers, but not non-strikers, to cross a picket line in order to become eligible for food stamps (Br. 15, 23). But surely Congress could rationally have concluded that (1) it is more likely that those workers who actually go out on strike are voluntarily unemployed; and (2) providing food stamps to non-strikers does not significantly jeopardize governmental neutrality in labor disputes.

[5] In this essential respect, the two workers hypothesized by the ACLU (Amicus Br. 11) are differently situated for purposes of food stamp benefits.

cluded that by extending food stamps to the households of voluntary quitters—unlike the households of strikers—it would not be choosing sides in a strike and thereby prolonging, and perhaps exacerbating, the work stoppage. See Comment, *Welfare for Strikers:* ITT *v.* Minter, 39 U. Chi. L. Rev. 79, 101-106 (1971).

4. a. Appellees dispute the goal of labor neutrality because it allegedly "import[s] * * * an extraneous factor into the eligibility criteria for an otherwise need-based program" (Br. 28). We agree that the Food Stamp Act is generally intended to "permit low-income households to obtain a more nutritious diet" (7 U.S.C. 2011). But that is surely not the only goal that Congress is constitutionally entitled to pursue within the ambit of the Food Stamp Act. Indeed, this Court expressly recognized in *United States Dep't of Agriculture* v. *Moreno*, 413 U.S. 528 (1973), that an amendment to the Food Stamp Act may be sustained if it "rationally further[s] some legitimate governmental interest other than those specifically stated in the congressional 'declaration of policy' " (413 U.S. at 534).

b. Appellees also quarrel with the goal of labor neutrality because "[n]o similar disqualification from otherwise available benefits is made for the employer whose employees find it necessary to strike" (Br. 30). They seem to suggest that Congress cannot withhold benefits from striking workers unless it first enacts separate Tax and Bankruptcy Codes that treat management more harshly when its employees are on strike. As the Court has repeatedly stated, however, "in addressing complex problems a legislature 'may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind' " (*Bowen* v. *Owens*, No. 84-1905 (May 19, 1986), slip op. 7 (quoting *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489 (1955)). See also *Lyng* v. *Castillo*, No. 85-250 (June 27, 1986), slip op. 8. Certainly

Congress is free to promote *additional* neutrality, even if it is unable or unwilling to enact *complete* neutrality.[6]

c. Finally, appellees contend (Br. 27-31) that this Court's articulation of the goal of governmental neutrality in *Ohio Bd. of Employment Servs.* v. *Hodory*, 431 U.S. 471 (1977), is inapplicable in this case. In their view, neutrality was a rational goal in *Hodory* because unemployment compensation, unlike food stamps, is financed with "employer payroll tax contributions," and thus " '[t]he employer's costs go up with every laid-off worker who is qualified to collect unemployment' " (Br. 28 (quoting *Hodory*, 431 U.S. at 492)). It is true that in the case of unemployment compensation, employers would indirectly finance part of the benefits through higher insurance premiums. But the Court nowhere suggested in *Hodory* that governmental neutrality is only a permissible goal where the employer bears such a double cost. In the present case, Congress determined that providing food stamps to striking workers could "be seen as encouragement to workers to 'wait out' management, rather than compromise." S. Rep. 97-139, 97th Cong., 1st Sess. 62 (1981). The government is entitled to promote neutrality

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[6] The ACLU discerns "impermissible animus" (Amicus Br. 8) and an intent "to tip the balance of power in labor relations in favor of management" (*id.* at 12-13) in the fact that Congress withheld food stamps from strikers, without imposing offsetting penalties on management. Its evidence of animus, however, is drawn entirely from comments made by *opponents* about *precursors* of the statute. See *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 203-204 n.24 (1976); *NLRB* v. *Fruit Packers*, 377 U.S. 58, 66 (1964). By contrast, in the *Moreno* case this Court relied on statements made by the proponents of the legislation for its determination that the legislation was tainted by an impermissible animus against hippies. See 413 U.S. at 534 (citing 116 Cong. Rec. 44439 (1970) (Sen. Holland)). See *ibid.* (Sen. Holland) (endorsing exclusion of "'hippy' communes" as "a good provision").

even where the failure to remain neutral imposes fewer costs on employers than unemployment compensation.

Appellees also contend that *Hodory* is inapplicable because food stamps, unlike unemployment compensation, are given only to households that meet financial eligibility requirements (Br. 28), and because they "ha[ve] a dramatically reduced effect upon both employers and strikers as compared to the case of unemployment insurance benefits" (*id.* at 28-29). Neither of those factors, however, had any bearing on the Court's recognition in the *Hodory* case that the government is entitled to promote neutrality in labor disputes.[7]

[7] Appellees claim (Br. 37 n.22) that we "misleadingly" referred the Court to two cases that, like *Hodory*, refused to apply strict scrutiny to statutes that denied government benefits to strikers. They assert, first, that when the court in *Russo* v. *Kirby*, 453 F.2d 548 (2d Cir. 1971), rejected the strikers' First Amendment claims as "frivolous," it did so only "in *dicta*." That is simply not so. The issue in *Russo* was whether the district court had jurisdiction to enjoin the refusal of the State of New York to provide welfare benefits to striking workers. The court of appeals held that there was no jurisdiction and accordingly set aside the lower court's injunction. In reaching that result, the court found that "[n]o colorable constitutional claim is presented to justify taking jurisdiction under § 1343. The argument that denying welfare benefits to strikers infringes their first amendments rights borders on the frivolous." 453 F.2d at 551. Plainly, that was a holding essential to the disposition on the merits. And that holding is not in the slightest impeached by the fact that "the plaintiffs in *Russo* eventually prevailed in state court and the benefits at issue were reinstated" (Br. 37 n.22). The state courts simply held that under state law the Commissioner of the Department of Social Services was entitled to provide welfare benefits to strikers. See *Lascaris* v. *Wyman*, 31 N.Y.2d 386, 292 N.E.2d 667, 340 N.Y.S.2d 397 (1972). The state courts did not even advert to any constitutional issues. Finally, it was not "in *dicta*" (Br. 37 n.22) that the three-judge court in *Francis* v. *Davidson*, 340 F. Supp. 351 (D. Md.), aff'd mem., 409 U.S. 904 (1972), rejected the equal protection challenge to a state's denial of AFDC benefits to children whose fathers were on strike. The court squarely decided that claim, but resolved the case in plaintiffs' favor on other grounds.

5. Recognizing that Congress acted rationally in enacting Section 2015(d)(3), two lower federal courts have rejected identical constitutional challenges to the statute, in decisions rendered since the filing of our opening brief.

a. According to the Sixth Circuit in *Ledesma* v. *Block*, 825 F.2d 1046 (1987), aff'g No. G82-94 (W.D. Mich. Aug. 26, 1985), "the difficult task of allocating scarce resources was foremost in the minds of the [Senate] Committee[ ]" when it adopted Section 2015(d)(3) (825 F.2d at 1048). Congress recognized that "social and value judgments would inevitably have to be made as between programs and within the programs themselves" (*ibid.*), and the court of appeals found those judgments to be entirely rational. It rejected (*id.* at 1051) as merely a "social argument[ ]" the claim that Section 2015(d)(3) is not genuinely neutral because the government has not imposed offsetting penalties on management.[8] The court also found that Section 2015(d)(3) rationally promotes the goal of "concentrating benefits on people who are unable to work" (825 F.2d at 1052).

b. The district court in *Eaton* v. *Lyng*, No. C 87-4073 (N.D. Iowa June 29, 1987), appeal pending, No. 87-819 (8th Cir.), also found Section 2015(d)(3) to be eminently rational. Explicitly rejecting the heightened scrutiny standard applied in the present case (slip op. 14),[9] the court explained (*id.* at 14-16) that neither "the historical mis-

[8] The court observed (825 F.2d at 1051-1052) that, in any event, Section 2015(d)(3) does not uniformly disfavor unions. It noted that the statute permits households to collect food stamps if they were eligible to do so before the strike began. And it pointed out that the statute does not require non-strikers to assist management by crossing a picket line in order to collect benefits.

[9] Appellees find it "difficult to fathom" why we have characterized the district court's decision in the present case as an application of heightened scrutiny (Br. 18 n. 12). We note, however, that the district court in the *Eaton* case read the case in the same way. See slip op. 14. See also *Ledesma* v. *Block*, 825 F.2d at 1052 ("[t]he main difference between [the *UAW* decision] and ours is the standard of constitutional review").

treatment of strikers" nor the fact that the "onus" of the law falls on "innocent members of [the] family" justifies a departure from the rational-basis test.[10] Applying that standard, the court agreed that Section 2015(d)(3) promotes governmental neutrality in labor disputes. "[W]ithout the amendment, the balance could tip decidedly in labor's favor, because only labor would receive a tangible and individualized form of compensation which is so effective in counteracting the effects of a strike. No comparable safety net for management is presently in place." Slip op. 18. The court rejected (*id.* at 17) plaintiffs' claim that the government cannot be neutral if it does not impose special tax and bankruptcy rules on management. "The proper question is whether progress toward that goal is rationally furthered" by the statute (*ibid.*). The court agreed that it was.[11]

[10] The court stated (slip op. 15 (emphasis in the original)) that the ability of unions to secure favorable legislative treatment "should have been a compelling reason *not* to adopt a heightened degree of judicial scrutiny." It also found the district court's reliance in the present case on *Plyler* v. *Doe*, 457 U.S. 202 (1982), unwarranted (*id.* at 15-16), noting that Section 2015(d)(3) does not present the "extreme circumstances" involved in *Plyler* (slip op. 15). Appellees believe otherwise, claiming that "[t]he activities of strikers, as a rule, are lawful and unquestionably more protected than those of the undocumented workers in *Plyler*" (Br. 33). As we show below, however (pages 11-14, *infra*), the right to strike does not enjoy the level of constitutional protection that appellees suppose, nor is it a right, like education, whose denial "imposes a lifetime hardship" and a "stigma of illiteracy [that] will mark [the children] for the rest of their lives" (*Plyler*, 457 U.S. at 223).

[11] The court also found that the interest in government neutrality furnished a "rational basis for treating strikers differently from those who quit and those who attempt to defraud the system" (*Eaton*, slip op. 18).

B. Section 2015(d)(3) Does not Abridge First Amendment Rights of Association or Expression

1. Appellees' First Amendment challenge to Section 2015(d)(3) rests, first and foremost, on a significant exaggeration about the impact of the statute. Throughout their brief, appellees depict Section 2015(d)(3) as if it made persons ineligible for food stamps because they exercised any of a vast array of First Amendment rights. As they put it, the statute "penalizes those exercising associational rights" (Br. 16) and "punishes individuals and their families for the exercise of the statutorily protected right to strike and its related constitutionally protected rights" (*id.* at 39-40).

In fact, of course, Section 2015(d)(3) does nothing of the sort. Households do not become ineligible for food stamps because their members associate with a union, or express union sentiments, or picket the premises of an employer. Cf. *Thornhill* v. *Alabama*, 310 U.S. 88 (1940). Only the act of striking brings Section 2015(d)(3) into play—an act that even appellees concede has received only "circumspect" protection under the First Amendment (Br. 38 n.23). See *Dorchy* v. *Kansas*, 272 U.S. 306, 311 (1926).

Appellees nevertheless defend a broad constitutional right to strike as an aspect of "associational freedom[]" (Br. 39). They note that "[a] strike cannot occur as an individual activity" and suggest that the right to strike must be constitutionally protected because it is "undertaken to further the goals of union members associated together as an organization" (*id.* at 38-39). Appellees ignore the fact that the "right to strike" does not exist in a regulatory vacuum, but must instead be understood against an elaborate body of statutory and decisional law that shapes and gives content to that right. Congress has historically sought to forge an appropriate balance between the right to strike and the social costs that strikes entail. In finding that balance Congress has, at different times, both expanded (see, *e.g.*, Norris-La Guardia Act, 29 U.S.C. 104;

Order of R.R. Tel. v. *Chicago & N.W. Ry.*, 362 U.S. 330 (1960)), and contracted (see, *e.g.*, Railway Labor Act, 45 U.S.C. 151-188; *Brotherhood of R.R. Trainmen* v. *Chicago R. & I. R.R.*, 353 U.S. 30 (1957); and Section 301(a) of the Labor-Management Relations Act, 1947, 29 U.S.C. 185(a); *Boys Mkts., Inc.* v. *Retail Clerks' Local 770*, 398 U.S. 235 (1970)), the right to strike. The decision of Congress to qualify the eligibility of striking workers to obtain food stamps was thus one in a long series of legislative judgments about the appropriate balance of rights and obligations in a pervasively regulated area of conduct. Cf. *Donovan* v. *Dewey*, 452 U.S. 594, 603 (1981); *United States* v. *Biswell*, 406 U.S. 311, 316 (1972); *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72, 74, 77 (1970).

Given this regulatory backdrop, it is simply untenable to claim that a union's freedom to associate entitles it to *act*—free from regulation—simply because that act is in the union's self-interest. This Court made that very point in *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949). The *Lincoln Federal* case involved the constitutionality of state laws that prohibited employers from denying employment to persons on the ground that they were, or were not, members of a labor organization. The union plaintiffs contended that the laws "abridge[d] the freedom of speech and the opportunities of unions and their members 'peaceably to assemble, and to petition the Government for a redress of grievances' " (335 U.S. at 529). Like appellees in the present case, the plaintiffs in *Lincoln Federal* conceded that the laws in question did not "expressly forbid the full exercise of those rights by unions or union members" (*id.* at 530). They asserted, nevertheless, that the laws "indirectly infringe[d] their constitutional rights of speech, assembly, and petition" because "[t]he right of unions and union members to demand that no non-union members work along with

union members is 'indispensable to the right of self-organization and the association of workers into unions' " (*ibid.*). This Court found it "unnecessary to elaborate the numerous reasons for [its] rejection of this contention" (*id.* at 531). In language equally dispositive of appellees' claim in the present case, the Court explained that the right to free association does not include everything that the association believes to be in its self-interest (*ibid.*):

> The constitutional right of workers to assemble, to discuss and formulate plans for furthering their own self interest in jobs cannot be construed as a constitutional guarantee that none shall get and hold jobs except those who will join in the assembly or will agree to abide by the assembly's plans. For where conduct affects the interests of other individuals and the general public, the legality of that conduct must be measured by whether the conduct conforms to valid law, even though the conduct is engaged in pursuant to plans of an assembly.

The Court applied the same principle in *International Union, UAW* v. *Wisconsin Employment Relations Bd.*, 336 U.S. 245 (1949), a case explicitly involving the right to strike. At issue was a state statute that prohibited employees from engaging in intermittent and unannounced work stoppages in an effort to secure bargaining advantages. The union plaintiff contended that the statute violated rights of free speech and assembly, but this Court rejected that claim. Citing *Lincoln Federal*, the Court tersely explained that "[f]or [the] reasons there stated, these contentions are without merit" (336 U.S. at 251-252).

Appellees are thus manifestly mistaken when they place the right to strike "at the very core of the First Amendment" and cloak it with a " 'constitutionally imposed "governmental obligation of neutrality" ' " (Br. 45 (citations omitted)). "[P]rotected 'union activities' include

advocacy and persuasion in organizing the union and enlarging its membership, and also in the expression of its views to employees and to the public. * * * It does not follow, however, that all activities of a union or its members are constitutionally protected." *Hanover Township Fed'n of Teachers Local 1954* v. *Hanover Community School Corp.*, 457 F.2d 456, 460 (7th Cir. 1972) (Stevens, J.) (footnote omitted). See also *United Fed'n of Postal Clerks* v. *Blount*, 325 F. Supp. 879 (D.D.C.), aff'd mem., 404 U.S. 802 (1971); *Ledesma* v. *Block*, 825 F.2d at 1050. Cf. 5 U.S.C. 7311(3) (no right to strike against the United States Government); 18 U.S.C. 1918 (criminal penalty for violation of 5 U.S.C. 7311). As Justice Jackson explained in the *UAW* case, "[t]he right to strike, because of its more serious impact upon the public interest, is more vulnerable to regulation than the right to organize and select representatives for lawful purposes of collective bargaining which this Court has characterized as a 'fundamental right' " (336 U.S. at 259). The right to strike accordingly does not enjoy the protection under the Constitution that appellees surmise.[12]

2. But even if the right to strike were entitled to more robust protection under the First Amendment, appellees' challenge to Section 2015(d)(3) is nonetheless meritless, because the statute simply does not prohibit union or family members from exercising First Amendment rights.

[12] A labor dispute that results in a strike is preeminently "a business transaction in which speech is an essential but subordinate component," and "[w]hile this does not remove the speech from the protection of the First Amendment, * * * it lowers the level of appropriate judicial scrutiny" (*Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 457 (1978)). See also *Roberts* v. *United States Jaycees*, 468 U.S. 609, 637-638 (1984) (emphasis in the original; citation omitted) (O'Connor, J., concurring in part and concurring in the judgment) (consistent with the First Amendment, "[a] State is free to impose rational regulation of the membership of a labor union representing 'the general *business* needs of employees' ").

Indeed, Section 2015(d)(3) does not *prohibit* anything; it simply refuses to offset a loss of income occasioned by the decision to participate in a strike. Even if a worker's loss of income would impair his capacity to exercise protected rights, the government's decision not to replace that income does not constitute a deprivation of constitutional rights. Put another way, "federal law protects the employees' right to authorize * * * a strike; it is equally clear, however, that federal law does not prohibit the [government] from deciding whether or not to compensate the employees who thereby cause their own unemployment" (*Baker* v. *General Motors Corp.*, No. 85-117 (July 2, 1986), slip op. 16).[13]

[13] As we noted in our opening brief (Br. 23-24), this Court's decision in *Harris* v. *McRae*, 448 U.S. 297 (1980), sharply distinguished the *denial* of constitutional rights from the simple *failure to fund* the exercise of those rights. Appellees contend that the *Harris* case does not apply because "[t]he constitutional freedoms at issue here, unlike the right to choose an abortion, are not lightly subjected to regulation" (Br. 45). But as we noted above, the right to strike—unlike other aspects of the right to free association—*is* constitutionally susceptible to considerable governmental regulation. See pages 11-14, *supra*. In any event, the Court in *Harris* did not predicate its distinction—between refusals to fund and outright denials—on the nature of the constitutional right at stake. That point is confirmed by *Buckley* v. *Valeo*, 424 U.S. 1, 94-95 (1976), in which the Court applied the same distinction even though the case involved the claim that the failure to fund offended a " 'constitutionally imposed "governmental obligation of neutrality" ' " (Br. 45 (citations omitted)). Appellees also distinguish *Harris* on the ground that the plaintiffs in that case, unlike those here, "were not disqualified from benefits altogether because they had chosen to exercise a constitutionally protected right" (Br. 46). See also ACLU Amicus Br. 23. But Section 2015(d)(3) does not "disqualif[y] altogether" households that contain a member who is on strike. Households may, for example, continue to receive food stamps if they were eligible to receive them before the strike began, and they lose their eligibility only so long as a member of the household is on strike. Like the Hyde Amendment in *Harris*, therefore, Section 2015(d)(3) "represents simply a refusal to subsidize certain protected conduct" (448 U.S. at 317 n.19).

Appellees insist, however, that their rights of association and expression must be free even from " 'more subtle governmental interference' " (Br. 41 (citation omitted)) and not simply from governmental action that "prohibits" or "directly interferes" with a constitutional right. The Court rejected the same claim in *Bowen* v. *Gilliard, supra.* In the *Gilliard* case, plaintiffs contended that heightened scrutiny was appropriate because the AFDC amendment interfered with the free association rights of families. As in the present case, the plaintiffs offered evidence of family members who had left their households because of the decrease in federal payments. The Court held, however, that incentives of that sort "are the unintended consequences of many social welfare programs, and do not call the legitimacy of the programs into question" (slip op. 14 n.17). As the Court put it, "[t]hat some families may decide to modify their living arrangements in order to avoid the effect of the amendment, does not transform the amendment into an act whose design and direct effect is to 'intrud[e] on choices concerning family living arrangements' " (*id.* at 14, quoting *Moore* v. *East Cleveland*, 431 U.S. 494, 499 (1977)).

Appellees' First Amendment challenge to Section 2015(d)(3) fails for precisely the same reason. As the district court in *Eaton* v. *Lyng* explained when it upheld the statute as constitutional (slip op. 13), Section 2015(d)(3) "does not create obstacles to the plaintiffs' exercise of their constitutional rights to free association and free speech." Rather, the pressure to leave a strike, to resign from a union, or to dissociate from a family "is created by the strike, and Congress has simply refused to use the food stamp program to solve the problem" (slip op. 10). See also *Ledesma* v. *Block*, 825 F.2d at 1051.

CONCLUSION

At bottom, appellees' challenge to Section 2015(d)(3) is addressed to the wisdom of the policy choices that Congress made. Appellees object to "harsh treatment of strikers and their households" (Br. 23) and point out examples that illustrate the impact of the statute on family life and on union activity (*id.* at 7-11). In their view, moreover, "the small percentage of striker households" participating in the Food Stamp program "hardly justif[ied] the sweeping disqualification imposed in 1981" (*id.* at 20-21 n.13). But as this Court stated in the *Gilliard* case last Term, such individual hardships are the inevitable by-product "of a decision to reduce or to modify benefits to a class of needy recipients. Under our structure of government, however, it is the function of Congress—not the courts—to determine whether the savings realized, and presumably used for other critical governmental functions, are significant enough to justify the costs to the individuals affected by such reductions." *Bowen* v. *Gilliard*, slip op. 9.

In the present case, Congress debated the propriety of affording food stamps to households of striking workers for more than a decade (Gov't Br. 4-11). Strong views were presented on both sides, and Congress considered the problem from all angles. Although Congress recognized the costs that Section 2015(d)(3) might impose on the households of striking workers, it ultimately determined that those costs were outweighed by the surpassing importance of reducing budget costs, tying benefits to the ability and willingness to work, and promoting government neutrality in labor disputes. Because that judgment is plainly rational, and because it offends no constitutionally protected rights, appellees' challenge to Section 2015(d)(3) must fail.

The judgment of the district court should be reversed.
Respectfully submitted.

CHARLES FRIED
Solicitor General

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AMICUS CURIAE

BRIEF

No. 86-1471

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

RICHARD A. LYNG, Secretary of Agriculture,
Appellant,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, et al.,
Appellees.

Appeal from the United States District Court
for the District of Columbia

BRIEF AMICUS CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION IN SUPPORT OF APPELLEES

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July 31, 1987

QUESTION PRESENTED

Whether the first and fifth amendments to the Constitution prevent the government from withholding food stamp benefits, generally available under a means-tested program, from an otherwise eligible, impoverished household where a household member participates in a strike?

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INTEREST OF AMICUS[1]

The American Civil Liberties Union Foundation (ACLU) is a nationwide, non-partisan organization of over 250,000 members dedicated to defending the principles embodied in the Bill of Rights. The ACLU has appeared before this Court on numerous occasions representing parties or as *amicus curiae*.

This case raises the important issue of whether the federal government may deny generally available, needs-tested benefits to an otherwise eligible, impoverished household where a family member engages in constitutionally-protected speech and associational activity.

The ACLU has an interest in preventing any government action that visits financial penalties on an individual who legitimately exercises his or her right to freedom of association or speech under the Constitution. Where the penalty also extends to the individual's spouse and minor children, the ACLU has an additional interest in protecting the right to family integrity, as well as in preventing discrimination that is violative of the equal protection component of the fifth amendment to the Constitution.

Because the ACLU believes that the challenged statute impermissibly burdens rights protected under both the first and fifth amendments to the Constitution, we submit this brief in support of appellees and urge affirmance of the judgment below.

STATEMENT OF THE CASE

To alleviate the hunger and malnutrition that persist in this nation, Congress provides nutritional assistance to low-income households under the food stamp program. The program extends assistance to any household that meets a strict income and asset test, complies with administrative requirements, and shows a willingness or inability to work.

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[1] The parties have consented to the filing of this brief, as indicated by their letters of consent filed with the Clerk of the Court.

This case challenges the constitutionality of a 1981 amendment to the Food Stamp Act that withdraws food stamp assistance from an otherwise eligible, impoverished household if a household member is on strike. The issue presented is whether the first and fifth amendments to the Constitution prohibit the government from penalizing or abridging an individual's legitimate exercise of speech and associational rights by withholding benefits to which a striker and his or her family are otherwise entitled under a generally available, means-tested program.

Under the amendment, a worker whose union has ordered him or her out on strike will not receive food stamps even if the family has exhausted its savings and the worker accepts alternative, interim employment. The disqualification extends to all household members, including children. If the worker had merely quit his or her job and accepted lower-paying employment, the family would receive food stamps if its new income were at or near the poverty level. The striker, by contrast, will receive food stamps only if he or she disassociates from the union and renounces the membership's strike vote. If the striker does not sever his or her union tie, the family, even if impoverished, forfeits food stamps unless the striker abandons spouse and children and leaves the household.

The record graphically illustrates the often devastating impact of the challenged amendment on children who are forced to suffer parental deprivation or outright hunger.[2] Consider:

> Plaintiff Bivens attested to the fact that his one-and two-year-old children "were sick a great deal during the period of the strike...due to a lack of nourishment." (J.A. at 8, ¶¶3, 6).

[2] The case comes before the Court after the grant of summary judgment, with an undisputed record as to the operation of the challenged amendment and its serious, even life-threatening impact upon striking union members, their spouses, and children. In assessing the constitutionality of the striker disqualification amendment, this Court's review must be guided by the factual record before the court below. *See Edwards* v. *Aguillard*, 55 U.S.L.W. 4860, 4868 (June 19, 1987) (White, J., concurring).

> Plaintiff Shorb, Jr. attested to the fact that he was forced to separate from his two teen-age children and relocate them out-of-state because they "were in danger of not having enough to eat." (J.A. at 47, ¶5).
>
> Plaintiff Berry attested to the fact that she was forced to move into a single room rental and to transfer custody of her son to her ex-husband "because she was no longer able to afford the expenses of supporting him." (J.A. at 7, ¶8)

Moreover, the record confirms the willingness of each of the individual plaintiffs to accept alternative, interim employment during the pendency of the strike. Despite documented destitution and compliance with all program requirements, the challenged amendment nevertheless denied food stamp assistance simply because the worker refused to renounce union membership or abandon spouse or children.

SUMMARY OF ARGUMENT

Under this Court's traditional equal protection analysis, the challenged amendment lacks rational basis because it does not promote any legitimate government purpose. Emanating from an impermissible animus against workers who exercise their speech and associational rights, the disqualification targets union members and their families for hostile treatment.

Union members who accept alternative, interim employment during the life of a strike remain barred from the food stamp program even if impoverished, while similarly situated workers who leave jobs for non-union reasons remain eligible. As such, the disqualification cannot be fairly claimed to encourage employment or to allocate scarce resources to those least able to meet daily food needs.

Moreover, the disqualification penalizes a worker who fails to renounce his or her union association by withholding benefits that are otherwise generally available under a means-tested program to indigent households. Far from declining to underwrite a worker's legitimate exercise of constitutional rights, the challenged amendment impermissibly permits the government to intervene

in labor disputes on behalf of management in a manner that cannot plausibly be characterized as neutral.

In addition, the amendment purports to achieve budgetary savings by withholding benefits from workers and family members whose financial and nutritional needs make them indistinguishable from similarly situated food stamp beneficiaries. No interest in cost saving can possibly justify denying benefits to a needy child as a penalty for the parent's disfavored conduct.

Finally, because more finely tailored mechanisms exist to provide for pro rata distribution of benefits even if the striker remains disqualified, administrative convenience cannot justify wholesale exclusion of children from this critical assistance program.

The challenged amendment also impermissibly conditions receipt of food stamps on a worker's non-exercise of constitutionally protected rights of speech and association. The first amendment protects an individual's right to associate and to speak. Yet a worker whose union has ordered him or her out on strike can receive food stamps only by severing union ties. Moreover, the disqualification, by effect, interferes with the worker's right to form and advocate opinions, free from government coercion, on the propriety of union activity. Finally, non-striking members of the household forfeit food stamps unless they end their association as a family unit. Since the challenged amendment is not narrowly tailored to advance a permissible purpose of the Food Stamp Act — indeed, it lacks any rational relation to the statutory program — the district court correctly invalidated the striker disqualification.

ARGUMENT

I. THE FIFTH AMENDMENT PROHIBITS THE GOVERNMENT FROM WITHHOLDING MEANS-TESTED BENEFITS FROM OTHERWISE ELIGIBLE, IMPOVERISHED HOUSEHOLDS, SIMILARLY SITUATED TO OTHER PROGRAM BENEFICIARIES, SIMPLY BECAUSE A HOUSEHOLD MEMBER IS ON STRIKE

A. The Food Stamp Act Provides Means-Tested Food Assistance to Destitute Households that are Willing or Unable to Work

In an effort "to promote the general welfare [and] safeguard the health and well-being of the Nation's population," the Food Stamp Act provides means-tested food assistance that "permit[s] low-income households to purchase a nutritionally adequate diet through normal channels of trade[.]" 7 U.S.C. § 2011.

Any indigent household that meets the program's financial limits, cooperates with administrative requirements, and shows a willingness or inability to work receives benefits. Assistance is in the form of coupons — "food stamps" — that may be redeemed for food, excluding tobacco and alcoholic beverages, in authorized grocery stores. 7 U.S.C. §§ 2012(g), 2013.

In 1981, the Omnibus Budget Reconciliation Act amended the Food Stamp Act to withhold food stamps from otherwise eligible strikers, as well as their spouses and children.[3] Prior to the amendment, strikers could receive food stamps — like all indigent households — so long as they satisfied the program's financial and other eligibility rules.

The overwhelming majority of strikers did not in fact receive food stamps. In most cases, their savings and other assets rendered them financially ineligible. 127 Cong. Rec. 561, 36-37. (daily ed. June 11, 1981) (statement of Sen. Levin). Indeed, one government

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[3] The 1981 amendment was originally codified at 7 U.S.C. (Supp. V 1981) § 2015(d)(4). Section 2015(d)(4) was redesignated as Section 2015(d)(3) by the Omnibus Budget Reconciliation Act of 1982, Pub. L. No. 97-253, § 290(b), 96 Stat. 787.

survey indicated that no more than 5,500 strikers participated in the program each year. H.R. Rep. No. 95-464, 95th Cong., Cong., 1st Sess. 10, *reprinted in* 1977 U.S. Code Cong. & Admin. News 1978, 1986.

According to the General Accounting Office:

> [I]n the 50 States and the District of Columbia, for the five 1-month periods for which data was available (during the period September 1976 to November 1979):
>
> The percentage of food stamp households containing a striker ranged from 0.29 percent to 2.1 percent of total food stamp households.

Senate Comm. on Agriculture, Nutrition, and Forestry, Omnibus Budget Reconciliation Act of 1981, S. Rep. No. 139, 97th Cong., 1st Sess. 62, *reprinted in* 1981 U.S. Code Cong. & Admin. News 452.

Those strikers who did receive food stamps were thus very poor – they had exhausted their life savings and lacked sufficient income for daily food purchases – but were willing to work and satisfied the program's work rules.

The 1981 amendment effected a dramatic change, so that a worker's participation in a lawful strike – even if he or she accepted alternative, interim employment during the pendency of the strike – barred the striker's entire family from the food stamp program. Only if the striker completely severed ties to the union or dissolved familial bonds would his or her spouse and children receive food stamps.

B. The Challenged Amendment Targets Union Members and their Families for Special Adverse Treatment Not Accorded to Similarly Situated Workers

Appellant misconstrues the 1981 amendment to camouflage its import and purpose, claiming that the disqualification "merely declines to underwrite" a worker's exercise of speech and associational rights. (App't Br. at 14). Appellant ignores, however, that

the 1981 amendment specifically targets union members and their families for adverse treatment not accorded to similarly situated workers who terminate jobs for reasons unrelated to union membership.

First, the 1981 amendment withholds food stamps from a union member and his or her family so long as the member refuses either to quit the strike and return to his or her original job or to disassociate from the union and take alternative employment. If the member accepts alternative, interim employment, the family continues to forfeit food stamps unless the worker severs union membership. 7 C.F.R § 273.1(g). Even if the member wants to return to his or her job, if the employer refuses to reinstate the worker during the life of the strike, the family continues to forfeit benefits. (J.S. App. 7a, 45a; J.A. 33-35). In contrast, a worker who voluntarily terminates employment must simply wait 90 days to receive food stamps. 7 C.F.R. § 273.7(n)(1)(v).

Second, the 1981 amendment withholds food stamps from a union member and his or her family even where the employer has precipitated the strike through unlawful activity – discrimination, unreasonable working conditions, or unfair labor practices. (J.A. 44a). In contrast, a worker who voluntarily terminates employment may avoid the 90-day waiting period upon "good cause" – a demonstration that the employer has practiced discrimination or imposed unreasonable working conditions. 7 C.F.R. § 273.7(n)(3)(i), (ii).

Finally, the 1981 amendment withholds food stamps from a union member and his or her entire household, even if the worker has no obligation to support the other household members. In contrast, a worker who voluntarily terminates employment does not affect the eligibility of other household members unless he or she is the primary wage earner. 7 C.F.R. § 273.7(n)(1)(iv).

The disparate treatment accorded to union members and their families undermines the government's claim that it is merely refusing to subsidize a worker's participation in a strike. To the contrary, the 1981 amendment singles out for special punishment

those workers who respond to unacceptable, illegal or discriminatory work conditions by striking – thereby maintaining their commitment to economic self-sufficiency – rather than by quitting for "good cause."

C. The History of the 1981 Amendment Reveals An Impermissible Animus Against Workers Who Exercise Speech and Associational Rights

The legislative history to the challenged amendment reveals the disqualification's impermissible animus to interfere with a worker's exercise of protected speech and associational rights through the imposition of a severe financial penalty upon the worker's family.

Between 1968 and 1980, Congress repeatedly considered and repeatedly rejected proposals to disqualify strikers and their families from the food stamp program. In each instance, Congress candidly acknowledged that the proposed disqualification sought to impose a financial penalty upon workers who legitimately choose to exercise their speech and associational rights as union members.

The food stamp program, as established in 1964, permitted strikers to receive assistance so long as they satisfied all financial and other eligibility requirements. Four years later, the House of Representatives – but not the Senate – adopted an amendment to the Act to disqualify strikers. *See* H.R. Rep. 1619, 90th Cong., 2d Sess. 4 (1968). The proposal was eventually deleted in conference. *See* H.R. Rep. 1908, 90th Cong., 2d Sess. 2 (1968). In declining to recommit the proposal to Committee, floor comments gave explicit consideration to the underlying, illegitimate purpose of the disqualification:

> [The proposal is] actually saying that because a father is out on strike and he does not have enough liquid assets to buy the simple necessities for his family, you are going to penalize the children and their mothers of the men who are on strike. That is what the [proposal] does. I do not care how you try to color it, that is its effect.
>
> * * *.

> [It] is a bill that seeks to bring pressure on those involved in strikes to go back because their children are hungry....I think this violates the tradition in the United States that the Government does not make strikes and it does not break strikes.

114 Cong. Rec. 28004 (daily ed. Sept. 25, 1968) (Statement of Rep. Saylor; Rep. Foley).

Proposals in 1970, 1971, 1972, 1973, 1974 and 1977 likewise met defeat because they sought impermissibly to "us[e] food as a weapon" against a worker's legitimate exercise of protected rights. Thus, the 1977 House Committee Report explained that any effort to disqualify strikers from the food stamp program would have engaged the government in the non-neutral act of favoring management over labor during a collective bargaining dispute.

> The real purpose of the amendment, therefore, was not to restore some government neutrality allegedly lost because strikers are eligible for food stamps but, on the contrary, to use a denial of food stamps as a pressure on the worker – or more accurately on his family – to help break a strike, since everyone in the household – mother, father, daughter, son, even infant child – would have been denied participation as well as the worker himself.
>
> * * *.
>
> It is not possible to justify such discrimination against hard working, responsible citizens.

H.R. Rep. 95-113, 95th Cong., 1st Sess. 129-130, *reprinted in* 1977 U.S. Code Cong. & Admin. News 2099.

Similarly, in response to efforts in 1980 to disqualify strikers from the program, the Committee acknowledged that withdrawal of benefits would have undermined and abridged a union member's right to associate:

> The labor laws protect the right to strike, and the courts have recognized that, when strikes are called in the appropriate manner after an unfortunate breakdown in collective bargaining, the right to strike is not illegal and is not subject to injunction or other legal restraint.

H.R. Rep. 96-788, 96th Cong., 2nd Sess. 132 (1980).

The 1980 proposal was thus defeated on the consistently recognized ground that "exclusion seemed unfair and inequitable and would have involved the government in the non-neutral act of pressuring the worker to abandon the strike." H.R. Rep. 96-788, 96th Cong., 2nd Sess. 131 (1980). *See also* H.R. Rep. 97-106(I) at 142 (1981).

D. The Striker Disqualification Amendment Cannot Survive Under Traditional Equal Protection Analysis

Notwithstanding the challenged amendment's demonstrable animus against union members who exercise their speech and associational rights, the government recites various purposes which the striker disqualification is said to promote. None of those purposes can save the challenged amendment from invalidation.

To survive under traditional equal protection analysis, a legislative classification must have "some 'reasonable basis,' " *Dandridge v. Williams*, 397 U.S. 471, 485 (1970). The "standard by which [welfare] legislation...must be judged 'is not a toothless one,' " *Mathews v. DeCastro*, 429 U.S. 181, 185 (1976), quoting *Mathews v. Lucas*, 427 U.S. 495, 510 (1976). The government "may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 446 (1985).

In determining whether there exists a rational basis for a challenged classification,

> We have to ask certain basic questions....What is the public purpose that is being served by the law? What is the characteristic of the disadvantaged class that justifies the disparate treatment?

Id. at 453 (Stevens, J., concurring).

Here, as the district court correctly found, the amendment's distinction between union members who adhere to a strike vote and other similarly situated food stamp recipients does not rationally relate to any permissible purpose of the Food Stamp Act.

1. The Challenged Amendment Does Not Provide For Those Most In Need by Promoting Employment But Rather Coerces Strikers to Sever Their Union Association

Appellant tries to save the challenged amendment by claiming that it provides for those most in need by promoting gainful employment. The government's *ipse dixit* does not survive scrutiny.

Consider two workers, John and Steve. Both leave their jobs. Worker John voluntarily quits his job because he does not like his boss. He accepts a lower-paying job with a friend. The family's new income entitles it to food stamps, and under the Act the family receives benefits.

By contrast, worker Steve goes on strike — perhaps because of illegal or discriminatory behavior of his employer. He immediately locates an alternative, interim job that happens to pay a lower salary. The family's income entitles it to food stamps, but under the amendment it forfeits benefits because Steve refuses to disassociate from the union and renounce the membership's strike vote.

The disparate treatment accorded to John and Steve isolates the sole purpose of the amendment — the punishment of union members who adhere to a strike vote — and illustrates how the amendment discriminates between workers who are similarly situated for purposes of the Food Stamp Act.

The government's implicit claim that the amendment's purpose is to limit benefits to those who cannot secure work does not comport with the statute. Before the anti-striker provision was adopted, a striker's eligibility depended on fulfilling the same

work registration and related work requirements as other beneficiaries. Rather than being subsidized for not working, the striker – as all food stamp receipients – was required to accept appropriate new employment. Under the challenged amendment, the government denies benefits even if the striker accepts alternative employment – unless the striker also abandons his or her ties to the union and the on-going strike.

The amendment singles out union members to compel them to return to particular jobs that they find offensive because of their union association. By contrast, similarly needy non-strikers are not required, as a condition of eligibility, to accept work at a struck plant. Presumably, no one would be required to accept work contrary to his or her religious principles. If the worker quits for "good cause" – which includes illegal work conditions or discriminatory employer practices – he or she can receive food stamps immediately, assuming compliance with the program's other requirements.

Providing food stamps to those who quit for "good cause" but denying them to those who strike for similar "good cause" is not only irrational but also counterproductive from the perspective of the asserted government purpose of providing assistance only to the truly needy by promoting self-sufficiency through gainful employment. The amendment disfavors those who respond to unacceptable, illegal, or discriminatory work conditions by striking, thereby maintaining their commitment to a job and continued self-sufficiency, rather than by simply quitting for "good cause." As such, the disqualification does not provide for those most in need or encourage gainful employment but rather coerces a striker to sever his or her union membership.

2. *Disqualification of Strikers from a Public Benefit Program Available to All Similarly Situated Persons Does Not Promote "Neutrality" in Labor Relations*

Nor can appellant fairly claim that the challenged amendment emanates from "a desire to achieve a greater measure of neutrality in labor disputes." (App't Br. at 17). The legislative history confirms that the driving purpose of the amendment was to tip the

balance of power in labor relations in favor of management by penalizing workers who participate in strikes. For the government to claim that the challenged amendment effects "neutrality" by withholding benefits requires a complete rewriting of the Act's history, purpose and operation.

Neutrality within the context of this comprehensive, means-tested statutory scheme can consist only of allowing impoverished strikers who meet program requirements to receive food stamp benefits. During the program's first 16 years of operation, the government extended benefits to all indigent households – even if a member engaged in a strike. Provision of benefits to strikers was consistent with the overall purpose of the program – a needs-based program that promotes recipient self-sufficiency through a range of work requirements. Strikers, like all beneficiaries, were required to comply with the program's work rules. The amendment alters the food stamp program to impose a special penalty upon strikers and their families by withdrawing benefits that remain available to similarly situated families.

Through the 1981 amendment, the government seeks to alter a pre-existing benefit program otherwise available upon a showing of need by denying benefits to needy people on one side of a labor dispute. To be sure, the government may take a step-by-step approach in the realm of social welfare legislation, *Dandridge v. Williams*, *supra*, 397 U.S. at 445. But "neutrality" cannot be promoted unless the government alters the program in a way that affects *all* parties to a dispute. The government here has not effected an even-handed withdrawal of a means-tested benefit. Foremen and other non-union or management personnel who might be laid off during the strike continue to be eligible for benefits.*

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* Moreover, in enacting the striker disqualification provision, part of the Omnibus Budget Reconciliation Act, the government in no way altered other features of pre-existing government programs that are otherwise generally available to employers and enhance their financial clout during a strike. For example, an employer engaged in a labor dispute retains eligibility for small business loans and may continue to deduct certain strike-related losses. H.R. Rep. 96-788, 96th Cong., 2d Sess. 132 (1980).

Appellant's reliance on *Ohio Bureau of Employment Servs. v. Hodory*, 431 U.S. 471 (1977) – which upheld denial of unemployment benefits to striking workers – is misplaced.

As this Court emphasized in *Hodory*, the overall purpose of the challenged unemployment insurance scheme was to adjust the relations between employers and employees and to identify specific circumstances in which employers, through their contributions to an unemployment compensation fund, should bear some responsibility for the welfare of their employees. Whether or not good policy, for the government to decide that this employer-funded plan should not be used to provide support for striking employees was found to be entirely consistent with the purpose of the program. *See id.* at 490-491.

Adjusting relations between employers and employees is a radically different purpose than that of the needs-based benefit program at issue here. "Need" is not a basis for the receipt of unemployment benefits – rich employees benefit when laid-off and, in direct contrast to needs-based programs, often receive larger payments than do poor employees. On the other side of the coin, many of the country's most needy individuals, although eligible for food stamps, are unable to obtain sufficient covered employment to become eligible for unemployment insurance. Moreover, unlike food stamps, unemployment insurance is not funded out of general tax revenues but through a special fund to which employers make contributions. It may be rational to conclude that a program designed to adjust relations between employers and employees, funded by employers, should not provide benefits to strikers since those benefits are essentially financed by the employer and impose a direct cost on the employer during a strike.

But the food stamp program does not adjust relations between employers and employees, and is funded out of general tax revenues. Provision of the benefits to strikers does not impose a direct cost to the employer. Thus, denial of unemployment insurance to strikers could be said in *Hodory* to be a condition of eligibility consistent with the purpose of the program, and, therefore, not unconstitutional, even though the denial of benefits burdened a constitutional right of association. Here, by contrast,

the denial of benefits is not a condition of eligibility consistent with the purpose of the food stamp program.

3. *Deficit Reduction Does Not Justify Denial of Food Stamps to Innocent Family Members, Especially Children, Whose Destitution Causes Them to Suffer Hunger and Malnutrition*

Nor can appellant fairly contend that striker disqualification is an appropriate method of deficit reduction. Whatever the government's interest in preserving the public fisc, it is settled that budgetary savings cannot be achieved through distinctions that deprive similarly situated persons of treatment accorded to others. *E.g., Plyler v. Doe*, 457 U.S. 202, 227 (1982) citing *Graham v. Richardson*, 403 U.S. 365, 374-75 (1971) ("...a concern for the preservation of resources standing alone can hardly justify the classifications used in allocating those resources").

As we have seen, the government purports to cut its costs by cutting benefits to a striker who is similarly situated to other impoverished workers who retain eligibility for food stamps. Moreover, the government denies benefits to an impoverished striker's children – persons who have engaged in no strike activity, cannot work, and are similarly situated to other destitute children whose parents voluntarily terminate their jobs yet nevertheless receive food stamps.

No governmental interest could possibly justify, as the district court found, "putting the onus of the striker's conduct on his family...." (J.S. App. 15a). This Court has repeatedly rejected classifications that deny benefits to a needy child based on the behavior of the child's parent or some other third party. In a broad range of contexts, the Court has recognized the impermissibility of visiting the sins of a parent upon a child. *E.g.*, U.S. Constitution Art. III, section 3, para. 2 (prohibiting corruption of blood as punishment for treason); *Plyler v. Doe*, 457 U.S. 202 (1982) (prohibiting denial of education to child of undocumented alien resident in Texas); *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972) (prohibiting discrimination against illegitimate child).[5]

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[5] Thus, in *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973), the Court sustained a state statutory system for financing public education that

Thus, in *Plyler v. Doe*, *supra*, 457 U.S. 202, the Court condemned the wholesale denial of education to the children of undocumented aliens:

> Even if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice.

Id. at 220.[8]

The children of undocumented aliens could " 'affect neither their parents' conduct nor their own status' " any more than children born out-of-wedlock could alter their parents' conduct or the legitimacy of their status. *Id.*, quoting *Trimble v. Gordon*, 430 U.S. 762, 770 (1977).

Under such circumstances,

> "[V]isiting...condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the... child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing."

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resulted in inter-district disparities in per-pupil expenditures. The Court suggested the possibility of a different result if Texas had completely denied some children an education. 411 U.S. at 25 n.60, 36-37.

[8] In some respects, *Plyler* goes beyond the principle asserted here, since, under the immigration laws, the child's presence, not just the adults, was undocumented and, thus, subjected the child to deportation independent of any adult. *See* 457 U.S. at 245 n.4 (Burger, White, Rehnquist and O'Connor, dissenting). For this reason, the dissent would not apply the principle of the illegitimacy cases in *Plyler*, *id.* at 246. The dissent's objection, however, would not apply to the children who are here denied food stamps. Indeed, the majority in *Plyler* found the denial of an education unconstitutional, given the child's general lack of responsibility for her presence, the affront to the basic notions of equality implicit in denying her a basic education, and the costs to the country of denying these benefits, which the state had seen necessary to provide gnerally, to people who, in fact, were likely to stay.

Id., quoting *Weber v. Aetna Casualty & Surety Co.*, *supra*, 406 U.S. at 175.

So, here, the children of strikers " 'can affect neither their parents' conduct nor their own status.' " *Id.* at 220. Moreover, the penalty here imposed is at odds with the concept that "legal burdens should bear some relationship to individual responsibility or wrongdoing," since the child has engaged in no disfavored conduct.[7]

In addition, the Court in *Plyler* recognized that while "[p]ublic education is not a 'right' granted to individuals by the Constitution," its deprivation imposes a lifetime hardship on affected children. *Id.* at 221. "The stigma of illiteracy will mark them for the rest of their lives....In determining the rationality of [the statute], we may appropriately take into account its costs to the Nation and to the innocent children who are its victims." *Id.* at 223-24.

So, here, denial of food imposes a lifetime hardship on an affected child. Food stamps enable poor persons to have access to a marginally nutritious diet. Their denial causes poor persons to suffer malnutrition and the adverse health consequences of hunger.

The nutritional importance of food stamp assistance to children in alleviating hunger and malnutrition cannot be overstated. The Secretary of Agriculture's studies of the effectiveness of food stamp assistance confirm that "[p]articipation in the food stamp program significantly influences the amount of nutrients obtained from home food supplies." J. Allen, *et al.*, "Nutrient Consumption Patterns of Low-Income Households," *USDA Economic Research Service, Elimination of the Purchase Requirement in the Food Stamp Program Effect on Participation and Cost* (Oct.

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[7] By the same token, in some instances, the disqualified worker will have voted against the strike, and is not responsible for the actions of the union. In any event, the worker is engaged in lawful activity and has committed no wrongdoing.

1979); *quoted in* Physician Task Force on Hunger in America, Harvard University School of Public Health, *Increasing Hunger and Declining Help: Barriers to Participation in the Food Stamp Program*, at 32 (May 1986).

Food stamp households, because of their increased food purchasing power, are able to purchase and consume significantly larger quantities (per capita) of essential nutrients than low-income households eligible for but not participating in the food stamp program. *Id.*

Denial of food stamps and consequent inadequate nutrition during childhood poses determinate health care risks, including cognitive deficit, delayed growth or stunting, and increased vulnerability to environmental toxins, including lead, which can adversely influence intellectual development. As at all ages, malnutrition in childhood can weaken resistance to infection. Childhood malnutrition thus directly affects the childhood education that was the subject of *Plyler*:

> In recent years...nutrition or malnutrition, has been discovered to have a significant bearing upon early child development. The currently available data from different countries regarding the effects of malnutrition (especially protein and iron deficiency) upon the physical and intellectual growth of children indicate that it can cause mental retardation, especially if it happens during the first year of life.

Encyclopedia Britannica, "Preschool Education," Vol. 9, p. 682 (1986).

A child deprived of adequate food may manifest no overt physical symptoms until his or her mental and physical condition is too deteriorated or too retarded to reverse:

> [R]ecent research indicates that functional impairment may result from poor childhood nutrition even in the absence of overt physical harm. The studies suggest that before easily measured changes in growth appear and before any nutrition-related disease is evident, a child's body may adapt

> to inadequate food by reduced metabolism. The implication is that the child may show no overt signs of impairment and yet be deprived of social and cognitive experiences that advance development.

J. Larry Brown, "Hunger in the U.S." *Scientific American*, at 38 (Feb. 1987).[8]

The "inestimable toll" of childhood hunger makes "clear that whatever savings might be achieved by denying [a striker's] children [food stamps], they are wholly insubstantial in light of the costs involved to these children, the State, and the Nation." *Plyler v. Doe*, *supra*, 457 U.S. at 230.[9]

4. Claims of Administrative Convenience Cannot Salvage the Challenged Disqualification

Finally, the district court correctly recognized that vague suggestions of administrative convenience could not justify wholesale exclusion of a striker's family from the food stamp program where the household is impoverished and willing to work. (J.S. App. 14a)

Wholesale exclusion of a category of needy persons no doubt promotes administrative convenience in a sense suggested by the

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[8] By the same token, inadequate nutrition caused by lack of food stamps harms the striker and his or her spouse. Loss of function characterizes the effect of mild malnutrition on young and middle-aged adults. Reduced productivity at work and impaired social function are both potential outcomes. Adults of all ages are vulnerable to infection and deficiency diseases associated with malnutrition. In old age, the risk of malnutrition is heightened once again. In this period, the impact of food on health maintenance and disease prevention is particularly crucial. Physician Task Force on Hunger in America, *Hunger in America: The Growing Epidemic* 67 (Harv. Univ. School of Pub. Health 1985).

[9] This case in no way raises the issue of whether equal protection mandates provision of food to ensure participation in the political process. Rather, the narrow issue presented is whether Congress, consistent with equal protection, may withhold food assistance otherwise available under a means-tested program from needy persons, solely because they exercise speech or associational rights or they associate with some third party – a parent – who engages in such exercise.

government. But surely the government could not, consistent with equal protection, achieve administrative convenience in a needs-based benefit program "through a random means, such as elimination from coverage of all persons with an odd number of letters in their surnames." *Ohio Bureau of Employment Servs. v. Hodory, supra*, 431 U.S. at 493.

The striker disqualification cannot fairly be claimed as a "prophylactic limitation on the dispensation of funds which is designed to cure systemic abuses." *Id.* at 524 (Rehnquist, J., dissenting). Appellant does not contend that strikers are better situated to engage in fraud and therefore must prophylactically be excluded from the program. Nor does appellant contend that strikers have in fact filed fraudulent food stamp claims. Indeed, those strikers who received benefits – and their numbers are minimal both in absolute and proportionate terms – complied with program requirements, including exhaustion of available resources and acceptance of any available employment. The government thus points to no "evil at hand" which may justify the striker's exclusion, *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487-88 (1955), and administrative convenience, standing alone, cannot fill that gap. *Vlandis v. Kline*, 412 U.S. 441, 451 (1973).[*]

Finally, administrative convenience cannot in any event rationally be achieved through the punishment of innocent children. The Act provides in a variety of circumstances for pro rata distribution of benefits where a single household member is to be disqualified from the program for reasons such as fraud. (J.S. App. 14a-15a). So, here, disqualification of the striker cannot rationally extend to disqualification of his or her spouse and children,

[*] *Lyng v. Castillo*, 106 S.Ct. 2727 (1986) does not suggest a different result. There, the Court upheld a provision of the Food Stamp Act requiring parents and children and siblings who reside together to apply for and participate in the food stamp program as a single household. The so-called relative deeming rule worked to reduce – but not withdraw – benefits from needy persons, and was found to have sufficient nexus to the government's administrative interest in deterrence of fraud to survive rational basis scrutiny. Here, no such interest exists.

where a more finely tailored mechanism already exists to deliver benefits to innocent and impoverished family members.

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The district court thus correctly held that the disqualification of strikers and their families from the food stamp program failed to promote a legitimate purpose of the Food Stamp Act and therefore was invalid under rational basis scrutiny as violative of equal protection.

II. THE GOVERNMENT MAY NOT CONDITION AN OTHERWISE ELIGIBLE, IMPOVERISHED HOUSEHOLD'S RIGHT TO A MEANS-TESTED BENEFIT UPON FORFEITURE OF FIRST AMENDMENT RIGHTS OF SPEECH AND ASSOCIATION

The striker disqualification withholds food stamps from an otherwise eligible, impoverished household because a household member has chosen to exercise protected rights – to think and speak free from government coercion and to associate with union or family.

"Only an especially important governmental interest pursued by narrowly tailored means can justify enacting a sacrifice of First Amendment freedoms as the price for an equal share of the rights, benefits, and privileges enjoyed by other citizens," *Bowen v. Roy*, 106 S.Ct. 2147, 2167 (1986) (O'Connor, J., concurring in part and dissenting in part). No "especially important government interest" is present in this case.

A. The Challenged Amendment Conditions Food Stamp Eligibility Upon Forfeiture of Speech and Associational Rights Protected Under the First Amendment

The challenged amendment works three impermissible effects, each of which impinges upon a protected constitutional right and conditions food stamps upon a forfeiture of that right.

First, the amendment requires the non-striking members of a family to give up their household association with a striker to

receive benefits. "[W]hen the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation." *Moore v. City of E. Cleveland*, 431 U.S. 494, 499 (citation omitted) (1977) (plurality opinion). The Court has repeatedly found the family unit to be a highly protected form of intimate association under the Constitution. *Zablocki v. Redhail*, 434 U.S. 374, 383-387 (1978).

Second, the amendment requires a member of a union which decides to engage in a legal strike, as well as the union which legally can and does require strike participation by its members (J.S. App. at 7a, ¶14), to give up their reciprocal rights of association. "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect...[of] freedom of speech. Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to...economic...matters," *NAACP v. Alabama*, 357 U.S. 449, 461 (1958). The right of association between a union and its members is a basic first amendment right, *Allee v. Medrano*, 416 U.S. 802, 819 n. 13 (1974), involving the "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious and cultural ends." *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984) (citations omitted).

Third, the amendment requires that in order to receive food stamps a striker who does not choose to disassociate from the union, must convince the union and its membership to call-off the strike. As the government put it, strikers could "pressure their union to reach a settlement." (J.S. App. 11a) Again, this Court has repeatedly recognized that the first amendment protects a person's right not to express views with which he or she disagrees. *See, e.g., Abood v. Detroit Bd. of Education*, 431 U.S. 209 (1977). Use of government benefits to coerce expression contrary to a person's belief is normally impermissible. *Wooley v. Maynard*, 430 U.S. 705 (1977); *Elrod v. Burns*, 427 U.S. 347 (1976).

B. The Amendment Explicitly Withdraws a Means-Tested Benefit Upon Exercise of First Amendment Rights

Notwithstanding the clear forfeiture of rights which the amendment effects, the government claims that the challenged amendment merely declines to subsidize the exercise of first amendment rights. To the contrary, the amendment explicitly withdraws a benefit otherwise available to the striker's household had first amendment rights not been exercised, thus effecting an impermissible forfeiture.

Notwithstanding the government's suggestion, plaintiffs do not seek to extend the categories of food stamp eligibility, but only to secure benefits that are otherwise forfeited because of their exercise of constitutional rights. Appellant's reliance on *Harris v. McRae*, 448 U.S. 297 (1980) is thus misplaced.

In *McRae*, this Court refused to require the government to extend Medicaid coverage to abortions because the government had no duty to fund constitutionally protected activities. The Court recognized that the government would not be free to withhold Medicaid coverage for non-abortion related medical needs simply because a claimant had exercised a constitutionally protected right to an abortion:

> A substantial constitutional question would arise if Congress had attempted to withhold all Medicaid benefits from an otherwise eligible candidate simply because that candidate had exercised her constitutionally protected freedom to terminate her pregnancy by abortion.

Id. at 317 n. 19.

The anti-striker condition is thus analogous to restrictions on provision of benefits to people whose statutorily-defined need for the benefit arises from their following the dictates of religion. *Id.* The Court has consistently struck down these conditions. *Hobbie v. Unemployment Appeals Comm'n of Florida*, 107 S.Ct. 1046 (1987); *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963).

Here, the restriction arises from the worker's continuing to exercise his or her constitutional right to associate with the union, or the family's continued association with the worker. Moreover, even a family whose eligibility is independent of its loss of the striking member's income, if this eligibility occurs after any family member has begun to strike, is denied food stamps. The denial occurs solely because of the presence in the family of a person on strike.

A long line of cases has invalidated discriminatory classifications that condition receipt of government benefits on forfeiture of various constitutional rights other than free exercise of religion.[a] Thus, in *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), this Court invalidated a state requirement that conditioned employment within the state university system upon written confession that one was not a Communist or if one had been a Communist, that one had communicated that fact to the head of the university. The Court rejected " 'the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable.' " *Id.* at 606.

The Court expressly applied the unconstitutional condition analysis of the free exercise cases to sum up its citation of a series of free speech and association cases, quoting *Sherbert*: "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Id.* at 606, quoting *Sherbert*, 374 U.S. at 404.

C. The Striker Disqualification Is Not Necessary and Does Not Substantially Promote a Legitimate Purpose of the Food Stamp Act

Nor may appellant fairly claim that the striker disqualification is permitted because necessary to promote the legitimate purposes of the food stamp program. *See Branti v. Finkel*, 445 U.S.

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[a] The government's assertion that the *Sherbert* analysis is not applied in other first amendment contexts, (Br. App't at 25), cannot be supported. *See, e.g., Keyishian v. Board of Regents*, 385 U.S. 589, 606 (1967). See also *Harris v. McRae, supra*, 448 U.S. at 317 n.19.

507 (1980); *Pickering v. Bd. of Education*, 391 U.S. 563 (1968). Requiring strikers to renounce continued association with a union, or requiring family members to renounce continued association with a parent or spouse is neither necessary to achieve nor even consistent with the food stamp program's purpose of providing for the basic nutritional needs of impoverished households.

Although the government has asserted a grab bag of purposes in defense of the condition, those asserted goals must be carefully examined. Mere tautology by the government does not suffice where first amendment rights are sacrificed. *See Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 541 (1985) (rejecting similar tautological reasoning in context of procedural due process). The government's asserted purposes can support the challenged amendment only if, first, those purposes are permissible and, second, they rationally fit the statutory scheme. In this case, the government's asserted purposes fail one or both requirements.

The government asserts two broad purposes for the anti-striker provision: saving money by restricting benefits to those most genuinely in need and achieving a greater measure of neutrality in labor disputes. (Br. App't at 17).

As we have seen, the first broad purpose – directing benefits to the truly needy – cannot be supported by the government's claim that the disqualification encourages gainful employment by limiting benefits to those who cannot work. First, the provision does not allow strikers to become eligible by meeting the work requirements imposed on other beneficiaries. Second, the broad statement of purpose is belied by other provisions of the Food Stamp Act that allow anyone but a striker to become eligible by not working if there is "good cause" or if the only work is at a struck company. Thus, rather than uniformly encouraging work, the striker exclusion singles out the striker for dissimilar hostile treatment while not even encouraging the striker to work as it does others.

The second broad purpose – achieving neutrality in labor disputes – likewise is not served by the striker disqualification.

As the Court explained in *Harris v. McRae*, whether denial of a means-tested benefit to a claimant who exercises a protected right constitutes a forfeiture and not a subsidy turns on the overall purpose and general scope of the governmental program at issue.

The government's characterization of the disqualification as neutral would be plausible *if* food stamps were to be supplied *only* to strikers. But the actual food stamp program makes means-tested benefits available to all indigent households that comply with program requirements. Disqualification of indigents because of participation in a strike is a non-neutral act – indeed, a penalty for striking. Thus, although the government asserts two purposes to justify the disqualification, neither purpose is rational given the overall purpose and specific features of the Food Stamp Act. Nor is the amendment narrowly tailored to advance those purposes with a minimum burden on the exercise of constitutional rights. To the contrary, the anti-striker provision serves only the unconstitutional purpose of discouraging the exercise of protected constitutional rights.

By the same analysis, the amendment forces a family to give up its association with a member who is on strike in order to receive benefits. The government may not properly analogize this case to those which involve only regulation of family arrangements and affect only the level of benefits which a family receives.

Thus, in *Lyng v. Castillo*, *supra*, 106 S.Ct. 2727, the Court upheld as constitutional the so-called relative deeming rule, which required parents and children and siblings who reside together to use resources which they mutually have available for their mutual support. The relative deeming rule did not result in a denial of benefits given the presumption of mutual support among close relatives who live together.

Moreover, the Court in *Castillo* found an important administrative interest in preventing fraud to support the rule. By contrast, the disqualification here effects an outright denial of benefits and has not been justified as a deterrent to fraud. Thus, as in *United States Dep't of Agriculture v. Moreno*, 413 U.S. 528 (1973), where the Court invalidated a food stamp rule that worked

to disqualify all affected households, the disqualification does not "further [an] interest in preventing fraud, or any other legitimate purpose of the Food Stamp Program". *Castillo*, *106 S.Ct.* at 2730 n. 3.

Finally, no permissible purpose exists to justify denial of food stamps to the striker's family members. As the district court emphasized, disqualification of the striker could be accomplished without difficulty or intrusiveness by excluding the striker from the household unit's budget determination. (J.S. App. 14a-15a). The program already requires identification of household members to determine benefit levels, and pro rata distribution is presently used in many situations, for example, to disqualify a person found to have committed food stamp fraud.

Conclusion

For the foregoing reasons, this Court should affirm the judgment of the United States District Court for the District of Columbia and hold that the disqualification of strikers and their families from the food stamp program is unconstitutional under the first and fifth amendments.

Respectfully submitted,

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